(1)

Supreme Court, U.S
FILED
JUL 10 2002
CLERK

No. 01-9094

IN THE

Supreme Court of the United States

ABU-ALI ABDUR'RAHMAN,

Petitioner,

v.

RICKY BELL,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

JOINT APPENDIX

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Petition for Certiorari filed March 19, 2002
Certiorari Granted April 22, 2002

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U.S. DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
(NASHVILLE)

[Filed 4/23/96]

CIVIL DOCKET FOR CASE #: 96-CV-380

ABU-ALI ABDUR'RAHMAN,

Petitioner,

v.

RICKY BELL,

Respondent.

DOCKET ENTRIES

DATE	NO	PROCEEDINGS
4/23/96	1	PETITION FOR WRIT OF HABEAS CORPUS - DEATH ROW with attachments. Various mtns included in petition, to be docketed separately. (ks) [Entry date 04/25/96]
12/2/96	42	AMENDED PETITION FOR WRIT OF HABEAS CORPUS (exhibits A-E attached) (ts) [Entry date 12/03/96]
1/31/97	44	ANSWER by respondent Ricky Bell to petition for writ of habeas corpus [42-1], to [1-1] (tlc) [Entry date 02/03/97]
6/10/97	54	MOTION by respondent Ricky Bell for summary judgment (tlc) [Entry date 06/11/97]

DATE	NO	PROCEEDINGS
6/10/97	55	MEMORANDUM by respondent Ricky Bell in support of motion for summary judgment [54-1] (tlc) [Entry date 06/11/97]
6/10/97	57	STATEMENT of material facts by respondent Ricky Bell in support of motion for summary judgment [54-1] (tlc) [Entry date 06/11/97]
10/10/97	85	SECOND MOTION by respondent Ricky Bell for summary judgment (tlc) [Entry date 10/14/97]
10/10/97	86	MEMORANDUM by respondent Ricky Bell in support of motion for summary judgment [85-1] (tlc) [Entry date 10/14/97]
10/10/97	87	STATEMENT of material facts by respondent Ricky Bell in support of second motion for summary judgment [85-1] (tlc) [Entry date 10/14/97]
10/15/97	88	FIRST MOTION by petitioner for partial summary judgment (tlc) [Entry date 10/17/97]
10/15/97	89	MEMORANDUM by petitioner in support of motion for partial summary judgment [88-1]; w/attachments 3-4 and attached hypnosis video (tlc) [Entry date 10/17/97]
10/15/97	90	MOTION by petitioner to strike precedural defenses (tlc) [Entry date 10/17/97]

DATE	NO	PROCEEDINGS
10/15/97	91	RESPONSE by petitioner to deft's first motion for summary judgment [54-1]; also included in this document is the petitioner's memorandum in support of motion to strike procedural defenses, DE #90 (tlc) [Entry date 10/17/97]
10/15/97	91	MEMORANDUM by petitioner in support of motion to strike procedural defenses response [91-1] (filed as part of petitioner's response to respondent's first motion for partial summary judgment) (tlc) [Entry date 10/17/97]
10/15/97	92	APPENDICES filed by petitioner re petitioner's responses to respondent's first motion for partial summary judgment [91-1], & petitioner's memorandum in support of motion to strike procedural defenses [91-1]; w/attachments 1 - 11 (tlc)[Entry date 10/17/97]
10/20/97	99	AMENDMENT to [89-1] petitioner's memorandum of fact and law in support of the first motion for a partial summary judgment (tlc) [Entry date 10/21/97]
10/20/97	100	APPENDIX of TN cases cited in support of petitioner's response to respondent's first motion for partial summary judgment and petitioner's memorandum in support of motion to strike procedural defenses; submitted by petitioner re [91-1] (tlc) [Entry date 10/21/97]

DATE	NO	PROCEEDINGS
11/10/97	105	REPLY by respondent to petitioner's response to respondent's first motion for summary judgment [54-1]; response to petitioner's motion to strike also filed as part of this document; w/attachments (tlc) [Entry date 11/12/97]
11/10/97	105	RESPONSE by respondent to petitioner's motion to strike precedural defenses [90-1]; filed as part of respondent's reply to petitioner's response to respondent's first motion for partial summary judgment; w/attachments (tlc) [Entry date 11/12/97]
12/5/97	112	RESPONSE by respondent to motion for partial summary judgment [88-1] (db)
12/5/97	113	MEMORANDUM in RESPONSE by petitioner to motion for summary judgment [85-1], to motion for summary judgment [54-1] (db)
12/5/97	114	EXHIBITS in support of mtn response #113 (db)
12/31/97	118	REPLY by petitioner Abu-Ali Abdur'Rahman to response to petitioner's first motion for partial summary judgment [88-1] (tlc) [Entry date 01/05/98]
12/31/97	119	APPENDIX filed by petitioner Abu-Ali Abdur'Rahman re reply [118-1]; w/attached exbibits A - F (tlc) [Entry date 01/05/98]

DATE	NO	PROCEEDINGS
1/21/98	124	ORDER by Judge Todd J. Campbell denying petitioner's motion for partial summary judgment [88-1] (cc: all counsel) (EOD 1/21/98) (tlc)
1/26/98	134	ORDER by Judge Todd J. Campbell denying petitioner's motion to strike precedural defenses [90-1] & denying respondent's first motion for summary judgment [54-1] for reasons as set forth in accompanying memorandum (cc: all counsel) (EOD 1/26/98) (tlc)
1/27/98	137	MOTION by petitioner for reconsideration of ruling on petitioner's first motion for partial summary judgment (tlc)
1/27/98	138	RESPONSE by petitioner to the respondent's procedural defenses (tlc)
1/27/98	139	ORDER by Judge Todd J. Campbell denying petitioner's motion for reconsideration of ruling on petitioner's first motion for partial summary judgment [137-1] (cc: all counsel) (EOD 1/28/98) (tlc) [Entry date 01/28/98]
4/8/98	205	MEMORANDUM OF THE COURT (cc: all counsel) (EOD 4/8/98) (tlc)

DATE	NO	PROCEEDINGS
4/8/98	206	ORDER by Judge Todd J. Campbell granting petitioner's habeas corpus petition [1-1] to the extent the Court vacates the Petitioner's sentence of death; remanding case to State of Tennessee for further proceedings not inconsistent w/this opinion; petitioner shall remain incarcerated as described in the memorandum (cc: all counsel) (EOD 4/8/98) (tlc)
5/7/98	207	NOTICE OF APPEAL by respondent Ricky Bell from Dist. Court decision [206-2] (mg) [Entry date 05/08/98]
5/7/98	212	RECEIVED filing fee and forwarded to 6th CCA, rcpt #63194 (mg) [Entry date 05/11/98]
5/8/98	210	NOTICE OF APPEAL by petitioner from Dist. Court decision [206-2] (mg)
5/8/98	211	MOTION by petitioner for a certificate of probable cause (mg)
5/8/98	--	PROPOSED Order for a certificate of probable cause (mg)
6/4/98	213	RESPONSE in opposition by respondent to motion for a certificate of probable cause [211-1] (mg) [Entry date 06/05/98]
6/9/98	216	ORDER by Judge Todd J. Campbell granting motion for a certificate of probable cause [211-1], granting motion to stay pending appeal [208-1] (cc: all counsel, 6C) EOD 6/9/98 (mg)

DATE	NO	PROCEEDINGS
11/6/98	--	SR Record on Appeal sent to 6th CCA re [210-1] (mg)
11/6/98	--	SR Record on Appeal sent to 6th CCA re [207-1] (mg)
11/30/98	223	NOTIFICATION by 6th CCA of Appellate Docket Number 98-6569 (mg) [Entry date 12/01/98]
11/30/98	224	NOTIFICATION by 6th CCA of Appellate Docket Number 98-6568 (mg) [Entry date 12/01/98]
9/15/00	225	INFORMATION COPY filed 9/13/00 from 6th CCA: The district court's finding of prejudice at the sentencing stage is REVERSED and the jgm granting the petition for a writ of habeas corpus as to petitioner's death sentence is VACATED. The district court's jgm denying the petition for a writ of hapeas corpus as to petitioner's conviction is AFFIRMED. (mg) [Entry date 09/18/00]
9/15/00	226	JUDGMENT by 6CCA: It is ORDERED that the district court's finding of prejudice at the sentencing state is REVERSED; the district court's jgm granting the petition for a writ of habeas corpus as to petitioner Raman's death sentence is VACATED; The district court's jgm denying the petition for a writ of habeas corus as to petitioner's conviction is AFFIRMED. (mg) [Entry date 09/18/00] [Edit date 01/22/01]

DATE	NO	PROCEEDINGS
3/15/01	--	RECORD on appeal returned from 6th CCA re appeal [225-1] (mg)
3/19/01	236	LETTER by Supreme Court of the U.S. extending to file petiton for a writ of cert up to 4/21/01 (mg) [Entry date 05/08/01]
4/30/01	233	LETTER by Supreme Court of the U.S.: time extended to 5/11/01 within which to file a petition for a writ of cert (mg) [Entry date 05/01/01]
5/7/01	237	LETTER by the Supreme Court of the U.S. extending time to file petition for a writ of cert up to 5/21/01 (mg) [Entry date 05/08/01]
5/31/01	240	ORDER by Judge Todd J. Campbell: the Court is in receipt of a petition for writ of certiorari with an accompanying letter from William P. Redick, Jr. dated 5/26/01; the Clerk is directed to file the petition and the letter as part of the record in this case (cc: all counsel) EOD 6/1/01 (vm) [Entry date 06/01/01]
6/1/01	241	LETTER dated 5/26/01, from William P. Redick, Jr. re writ of certiorari being filed w/the Supreme Court on 5/21/01 (vm)
6/1/01	242	PETITION FOR WRIT OF CERTIORARI (copy) by petitioner Abu-Ali Abdur'Rahman (vm)
6/11/01	243	NOTICE by Supreme Court of the U.S. of filing of petition for writ of cert on 5/21/01. (mg) [Entry date 06/12/01]

DATE	NO	PROCEEDINGS
10/9/01	246	MOTION by petitioner Abu-Ali Abdur'Rahman for expediated status conference (w/proposed order) (vm)
10/9/01	247	ORDER by Judge Todd J. Campbell granting motion for expediated status conference [246-1] Status conference set for 9:00 10/10/01 (cc: all counsel) EOD 10/09/01 (mg) [Edit date 10/10/01]
10/10/01	248	CLERK'S RESUME Status conference held 10/10/01 Petitioner felt it necessary to discuss possible future proceedings in this case. Order to enter; C/R: Jim Spence (mg) [Entry date 10/11/01]
10/19/01	251	ORDER by the Supreme Court of the U.S. denying motion of respondent to strike portions of the brief as amici curiae, of the National Mental Health Assoc, et al; denying petition for a writ of cert. (mg) [Entry date 10/23/01]
11/2/01	253	STATUS REPORT dated 11/2/01 by petitioner (with attacments: Appendix 1-9) (mg) [Entry date 11/05/01]
11/2/01	254	MOTION by petitioner for relief with Exhs A & B attached (mg) [Entry date 11/05/01]
11/2/01	255	MEMORANDUM by petitioner in support of motion for relief [254-1] (1 vol, includes attachments A-E) (mg) [Entry date 11/05/01]
11/2/01	256	NOTICE by petitioner of filing juror affidavits (mg) [Entry date 11/05/01]

DATE	NO	PROCEEDINGS
11/2/01	257	AFFIDAVIT of Bonnie M. Meyer re [254-1] (mg) [Entry date 11/05/01]
11/2/01	258	AFFIDAVIT of Alice Stoddard re [254-1] (mg) [Entry date 11/05/01]
11/2/01	259	AFFIDAVIT of Jimmy Swarner re [254-1] (mg) [Entry date 11/05/01]
11/2/01	260	AFFIDAVIT of Scarlett McAllister Smith re [254-1] (mg) [Entry date 11/05/01]
11/2/01	261	AFFIDAVIT of Yolanda Howard re [254-1] (mg) [Entry date 11/05/01]
11/2/01	262	UNNOTARIZED AFFIDAVIT of Loretta L. Gallaway Simpson re [254-1] (mg) [Entry date 11/05/01]
11/2/01	263	UNNOTARIZD AFFIDAVIT of Jury Forman (name not legible) re [254-1] (mg) [Entry date 11/05/01]
11/2/01	264	AFFIDAVIT of James D. Wimberly re [254-1] (mg) [Entry date 11/05/01]
11/14/01	265	STATUS REPORT by petitioner dated November 14, 2001: Petition for Rehearing has been filed with the U.S. Supreme Court (copy of petition attached) (mg)
11/26/01	266	RESPONSE by respondent Ricky Bell to motion for relief [254-1] (w/att'd exhibits 1-2) (vm)

DATE	NO	PROCEEDINGS
11/27/01	267	ORDER by Judge Todd J. Campbell re [254-1] Because this motion is a second or a successive petition subject to 28 USC Section 2244, this case is transferred to the 6CCA pursuant to 28 USC Section 1631 (cc: all counsel, 6C) EOD 11/27/01 (mg)
11/29/01	--	REMARK: Record transferred to the 6CCA; copies of pertinent documents forwarded to 6CCA. (mg) [Edit date 11/30/01]
11/30/01	268	NOTICE OF APPEAL by petitioner Abu-Ali Abdur'Rahman from Dist. Court decision [267-1] (mg) [Entry date 12/03/01]
11/30/01	269	APPLICATION by petitioner for a certificate of appealability (with attachment 1) (mg) [Entry date 12/03/01]
12/3/01	--	REMARK: Copy of NOA and docket sheet sent to the parties. (mg)
12/3/01	270	ORDER by Judge Todd J. Campbell re [269-1] The Court finds that it does not have jurisdiction to rule on petitioner's appl for a certificate of appealability (cc: all counsel, 6C) EOD 12/4/01 (mg) [Entry date 12/04/01]
12/4/01	--	SR Record on Appeal sent to 6th CCA re [268-1] (mg)
12/10/01	272	NOTIFICATION by 6th CCA of Appellate Docket Number 01-6504 (mg) [Entry date 12/11/01] [Edit date 12/12/01]

DATE	NO	PROCEEDINGS
12/10/01	273	ORDER by the Supreme Court of the U.S. denying petition for rehearing (mg) [Entry date 12/12/01]
1/20/02	274	ORDER from 6th CCA: The appl for a certificate of appealability is denied. The motions or requests that Rule 60(b) appeal be heard initially en banc and to consolidate the Rule 60(b) appeal with pending motions in Numbers 98-6568/6569 are not matters which this panel can resolve, because they should be decided by the en banc court. Thus, all relief requested to this panel is denied. (mg) [Entry date 01/22/02]
2/13/02	275	ORDER from 6th CCA: Petitioner's motion for rehearing of Nos 98-6568/6569 is DENIED; Petitioner's motion to consolidate No. 01-6504 with Nos 98-6568/6569 is DENIED; the Mandate of the court in Nos 98-6568/6569 shall issue forthwith; The order construing an ostensible Rule 60(b) motion as an appl for leave to file a second habeas corpus petition and transfering it to the court of appeals is not an appealable order in No. 01-6504, which is therefore DISMISSED for lack of jurisdiction; The motion for initial hrg en banc of No. 01-6504 and for rehearing of the court's denial of a certificate of appealability in the matter is DENIED; The appl for leave to file a second habeas corpus petition, as transfered to the court of the district court in No. 01-6487, is DENIED.

DATE	NO	PROCEEDINGS
		Review of the above cases concluded. (mg) [Entry date 02/14/02] [Edit date 02/14/02]
2/13/02	276	MANDATE issued 2/11/02, from 6th CCA reversing decision of the District Court [Appeal [225-1] finding prejudice at the sentencing stage, VACATING the judgment of the district court granting petition for a writ of habeas corpus as to petitione's death sentence (6C Nos 98-6568/ 98-6569) (mg) [Entry date 02/14/02]
2/28/02	277	MANDATE issued 2/26/02 from 6th CCA dismissing the appeal [268-1] for lack of jurisdiction pursuant to the courts disposition filed 2/11/02 (re 6C #6504) (mg)
4/8/02	278	ORDER from the US Supreme Court (01-9094): The application for stay of execution presented to Justice Stevens & by him referred to the Court is granted pending the disposition of the for a writ of certiorari. Should the petition for a writ of cert. be denied, this stay shall terminate automatically. the event the petition for a writ of cert. is granted, the stay shall terminate upon the sending down of the judgment of this Court. EOD 4/8/02 (cc: all counsel) (db) [Edit date 04/09/02]
4/8/02	279	ORDER from the US Supreme Court (01-9095) denying the petition for writ of habeas corpus. EOD 4/8/02 (cc: all counsel) (db) [Edit date 04/09/02]

DATE	NO	PROCEEDINGS
4/22/02	280	NOTICE from US Supreme Court that a writ of certiorari was filed on 3/19/02 and placed on the 4/19/02 docket as No. 01-9094 (af)
5/14/02	281	NOTICE from US Supreme Court that lv to proceed IFP granted and petition for writ of certiorari granted (mk)

U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

CIVIL DOCKET FOR CASE #: 98-6568/-6569

ABU-ALI ABDUR'RAHMAN,

Petitioner – Appellee – Cross-Appellant,

v.

RICKY BELL,

Respondent – Appellant – Cross-Appellee.

DOCKET ENTRIES

DATE	PROCEEDINGS
11/20/98	Death Penalty Case Docketed, with CPC unnecessary. Notice filed by Appellant Ricky Bell. Transcript needed: y (jmb) [98-6568]
2/24/99	FIRST PROOF BRIEF filed by Gordon W. Smith for Appellant Cross-Appellee Ricky Bell. Certificate of Service date 2/22/99. Number of Pages: 43. [98-6568, 98-6569] (teb) [98-6568 98-6569]
2/24/99	Request to require oral argument filed by Gordon W. Smith for Appellant Cross-Appellee Ricky Bell. [98-6568, 98-6569] (teb) [98-6568 98-6569]
4/26/99	PROOF BRIEF filed by Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Copies: 1. Certificate of Service date 4/23/99. Number of Pages: 134. [98-6568, 98-6569] (ds) [98-6568 98-6569]

DATE	PROCEEDINGS
8/30/99	PROOF BRIEF filed by William P. Redick and Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Certificate of service date 8/27/99. Number of Pages: 50. [98-6568, 98-6569] (ds) [98-6568 98-6569]
9/27/99	FINAL BRIEF filed by Gordon W. Smith for Appellant Cross-Appellee Ricky Bell. Copies: 7. Certificate of Service date 9/24/99. Number of Pages: 44. [98-6568, 98-6569] (ds) [98-6568 98-6569]
9/27/99	FINAL BRIEF filed by Gordon W. Smith for Appellant Cross-Appellee Ricky Bell. Copies: 7. Certificate of service date 9/24/99. Number of Pages: 44. [98-6568, 98-6569] (ds) [98-6568 98-6569]
9/28/99	FINAL BRIEF filed by William P. Redick and Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Copies: 7 Certificate of service date 9/27/99. Number of Pages: 115. [98-6568, 98-6569] (ds) [98-6568 98-6569]
9/28/99	FINAL BRIEF filed by Bradley A. MacLean and William P. Redick for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Copies: 7. Certificate of service date 9/27/99. Number of Pages: 75. [98-6568, 98-6569] (ds) [98-6568 98-6569]
10/6/99	APPENDIX filed by Gordon W. Smith for Appellant Cross-Appellee Ricky Bell. Copies: 5 (11 Volumes/VOL IV SEALED). Certificate of service date 9/14/99. [98-6568, 98-6569] (ds) [98-6568 98-6569]
10/13/99	Corrected fourth final brief filed by Bradley A. MacLean and William P. Redick. Copies:

DATE	PROCEEDINGS
	7. Certificate of Service date 10/12/99. [98-6568, 98-6569] (ds) [98-6568 98-6569]
10/13/99	Appellee MOTION filed to file supplemental appendix. Motion filed by William P. Redick for Appellee Cross-Appellant Abu-Ali Abdur'Rahman in 98-6568, Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman in 98-6568/6569. Certificate of service date 10/12/99. [98-6568, 98-6569] (jmb) [98-6568 98-6569]
10/13/99	SUPPLEMENTAL APPENDIX TENDERED. Received from William P. Redick for Appellee Cross-Appellant Abu-Ali Abdur'Rahman in 98-6568/6569, Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman in 98-6568/6569. [98-6568, 98-6569] Copies: 7. Certificate of service date 10/12/99. Corrections to be made: motion pending (jmb) [98-6568 98-6569]
11/16/99	ORDER filed granting motion to file supplemental appendix [2030493-1] filed by William P. Redick Jr., Bradley A. MacLean, William P. Redick Jr., Bradley A. MacLean [98-6568, 98-6569] in 98-6568, 98-6569. Entered by order of the court. (jmb) [98-6568 98-6569]
11/16/99	SUPPLEMENTAL APPENDIX filed by Brian K. Frazier for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Copies: 7. Certificate of service date 10/12/99. [98-6568, 98-6569] (ds) [98-6568 98-6569]
1/6/00	CERTIFIED RECORD filed. Volumes include 1 Pl. [98-6568, 98-6569] (mrs) [98-6568 98-6569]

DATE	PROCEEDINGS
1/25/00	ADDITIONAL CITATION filed by William P. Redick and Bradley MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman in 98-6568, 98-6569. Certificate of service date 1/25/00. [98-6568, 98-6569] (cb) [98-6568 98-6569]
1/27/00	ORDER filed denying motion to enlarge the time for oral argument [2088556-1] filed by William P. Redick Jr., Bradley A. MacLean [98-6568, 98-6569] in 98-6568, 98-6569. Entered by order of the court. (jmb) [98-6568 98-6569]
1/28/00	ADDITIONAL CITATION filed by Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Certificate of service date 1/25/00. [98-6568, 98-6569] (yh) [98-6568 98-6569]
1/31/00	CAUSE ARGUED on 1/31/00 by Gordon W. Smith for Appellant Cross-Appellee Ricky Bell in 98-6568/6569, Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman in 98-6568/6569, William P. Redick for Appellee Cross-Appellant Abu-Ali Abdur'Rahman in 98-6568/6569, before Judges Siler, Batchelder, Cole. [98-6568, 98-6569](me) [98-6568 98-6569]
4/27/00	ADDITIONAL CITATION filed by William P. Redick for Appellee Cross-Appellant Abu-Ali Abdur'Rahman in 98-6568, Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman in 98-6568, William P. Redick for Appellee Cross-Appellant Abu-Ali Abdur'Rahman in 98-6569, Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman in 98-6569. Certificate of

DATE	PROCEEDINGS
	service date 4/25/00. [98-6568, 98-6569] (cb) [98-6568 98-6569]
7/17/00	ADDITIONAL CITATION filed by William P. Redick & Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman Certificate of service date 7/14/00. [98-6568, 98-6569] (cb) [98-6568 98-6569]
9/13/00	OPINION filed: the dist. ct's. finding of prejudice at the sentencing stage is REVERSED; the dist. ct's. judgment granting the petition for writ of habeas corpus as to petitioner Abu-Ali Abdur'Rahman's death sentence is VACATED; the dist. ct's. judgment denying the petition for a writ of habeas corpus as to Petitioner's conviction is AFFIRMED. Decision for publication pursuant to local rule 206 [98-6568, 98-6569]. Eugene E. Siler, Authoring Circuit Judge; Alice M. Batchelder, Circuit Judge, concurring; R.G. Cole, Circuit Judge, dissenting. (jmb) [98-6568 98-6569]
9/13/00	JUDGMENT: the district court's finding of prejudice at the sentencing stage is REVERSED; the district court's judgment granting the petition for a writ of habeas corpus as to petitioner Abu-Ali Abdur'Rahman's death sentence is VACATED; the district court's judgment denying the petition for a writ of habeas corpus as to Petitioner's conviction is AFFIRMED. (jmb) [98-6568 98-6569]
9/20/00	FILED: Copy of Motion filed at Supreme Court of Tennessee to re-set the execution date, from Glenn R. Pruden for Appellant

DATE	PROCEEDINGS
	Cross-Appellee Ricky Bell in 98-6568, 98-6569 [98-6568, 98-6569] (cb) [98-6568 98-6569]
10/11/00	PETITION for en banc rehearing filed by William P. Redick and Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Certificate of service date 10/10/00. [98-6568, 98-6569] (blh) [98-6568 98-6569]
10/23/00	LETTER SENT by blh to Gordon W. Smith for Appellant Cross-Appellee Ricky Bell notifying that party is directed to respond to a petition for en banc rehearing [2235975-1] filed by William P. Redick Jr. and Bradley A. MacLean. Response due by 11/6/00. Gordon W. Smith was also notified by telephone today. [98-6568, 98-6569]. (blh) [98-6568 98-6569]
11/6/00	RESPONSE to a petition for en banc rehearing [2235975-1] previously filed by William P. Redick Jr. and Bradley A. MacLean. Response filed by Gordon W. Smith for Appellant Cross-Appellee Ricky Bell. Certificate of service date 11/3/00. [98-6568, 98-6569] (blh) [98-6568 98-6569]
12/11/00	CERTIFIED RECORD RETURNED to lower court at the end of appellate proceedings. [98-6568, 98-6569]. Volumes included:1 Pl;. (mrs) [98-6568 98-6569]
12/22/00	ORDER filed denying petition for en banc rehearing [2235975-1] filed by William P. Redick Jr. and Bradley A. MacLean. [98-6568, 98-6569]. Eugene E. Siler, Alice M. Batchelder, R. G. Cole, Circuit Judges. (blh) [98-6568 98-6569]

DATE	PROCEEDINGS
12/28/00	Appellee MOTION filed for stay of mandate pending petition for writ of certiorari. Motion filed by William P. Redick & Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Certificate of service date 12/28/00. [98-6568, 98-6569] (mcp) [98-6568 98-6569]
1/9/01	Appellant RESPONSE in opposition filed regarding a motion to stay mandate [2279628-1] ; previously filed by William P. Redick Jr., Bradley A. MacLean . Response from Gordon W. Smith for Appellant Cross-Appellee Ricky Bell. Certificate of service date 1/8/01. [98-6568, 98-6569] (jmb) [98-6568 98-6569]
1/9/01	ORDER filed granting motion to stay mandate pending petition for writ of certiorari [2279628-1] filed by William P. Redick Jr., Bradley A. MacLean [98-6568, 98-6569] in 98-6568, 98-6569. Eugene E. Siler, Circuit Judge, Alice M. Batchelder, Circuit Judge, R. G. Cole, Circuit Judge. (jmb) [98-6568 98-6569]
1/11/01	ORDER filed granting motion to stay mandate for 90 days pending application for cert [2279628-1] filed by William P. Redick Jr., Bradley A. MacLean, William P. Redick Jr., Bradley A. MacLean [98-6568, 98-6569] in 98-6568, 98-6569. Eugene E. Siler, Circuit Judge, Alice M. Batchelder, Circuit Judge, R. G. Cole, Circuit Judge. (cb) [98-6568 98-6569]
3/12/01	U.S. Supreme Court letter filed: Extension of time within which to file a petition for a writ of certiorari granted to and including 04-21-01. [2320171-1]. [98-6568, 98-6569] (swh)

DATE	PROCEEDINGS
	[98-6568 98-6569]
4/19/01	U.S. Supreme Court letter filed: Extension of time within which to file a petition for a writ of certiorari granted to and including 05-11-01. [2341826-1]. [98-6568, 98-6569] (swh) [98-6568 98-6569]
5/3/01	U.S. Supreme Court letter filed: Extension of time in which to file a petition for a writ of certiorari granted to and including 05-21-01. [2349328-1]. [98-6568, 98-6569] (swh) [98-6568 98-6569]
5/31/01	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Filed in the Supreme Court on 05-21-01, Supreme Ct. case number: 00-1742. [98-6568, 98-6569] (swh) [98-6568 98-6569]
10/10/01	Appellee MOTION filed to stay the mandate and grant rehearing en banc or remand for further proceedings. Motion filed by William P. Redick and Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Certificate of service date 10/9/01. [98-6568, 98-6569] (blh) [98-6568 98-6569]
10/12/01	ADDITIONAL CITATION in support of the motion to withhold the mandate and grant rehearing en banc or remand for further proceedings filed by Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Certificate of service date 10/11/01. [98-6568, 98-6569] (blh) [98-6568 98-6569]
10/16/01	U.S. Supreme Court letter filed denying petition for writ of certiorari [2365390-1]

DATE	PROCEEDINGS
	filed by Abu-Ali Abdur'Rahman [98-6568, 98-6569] in 98-6568, 98-6569. Filed in the Supreme Court on 10-09-01. (swh) [98-6568 98-6569]
10/17/01	LETTER SENT by blh to Gordon W. Smith for Appellant Cross-Appellee Ricky Bell notifying that party is directed to respond to a motion to stay mandate and grant rehearing en banc or remand for further proceedings [2437729-1] filed by William P. Redick Jr. and Bradley A. MacLean. Response due by 10/31/01. [98-6568, 98-6569]. (blh) [98-6568 98-6569]
10/18/01	Appellant Cross-Appellee RESPONSE filed in opposition to motion to stay the mandate and grant rehearing en banc or remand for further proceedings [2437729-1] filed by William P. Redick Jr. and Bradley A. MacLean. Response from Gordon W. Smith for Appellant Cross-Appellee Ricky Bell. Certificate of service date 10/17/01. [98-6568, 98-6569] (blh) [98-6568 98-6569]
10/29/01	Appellee Cross-Appellant MOTION filed for leave to file a reply in support of his petition for rehearing en banc. [2448170-1] Motion filed by William P. Redick and Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Certificate of service date 10/26/01. [98-6568, 98-6569] (blh) [98-6568 98-6569]
10/29/01	TENDERED: reply in support of his petition for rehearing en banc from William P. Redick and Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman [98-6568, 98-6569] (blh) [98-6568 98-6569]

DATE	PROCEEDINGS
10/29/01	TENDERED: reply in support of his motion to stay the mandate and grant rehearing en banc or remand for further proceedings from William P. Redick and Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman [98-6568, 98-6569] (blh) [98-6568 98-6569]
11/30/01	LETTER SENT by blh granting motion for leave to file a reply in support of the petition for rehearing en banc [2448170-1] filed by William P. Redick Jr. and Bradley A. MacLean. Appellee/Cross-Appellant's reply in support of the motion to withhold the mandate or remand for further proceedings is also accepted for filing. [98-6568, 98-6569] (blh) [98-6568 98-6569]
11/30/01	REPLY IN SUPPORT of the petition for rehearing en banc filed by William P. Redick and Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Certificate of service date 10/26/01. [98-6568, 98-6569] (blh) [98-6568 98-6569]
11/30/01	REPLY IN SUPPORT of the motion to withhold the mandate or remand for further proceedings [2437729-1]; filed by William P. Redick Jr. and Bradley A. MacLean for Appe'lee Cross-Appellant Abu-Ali Abdur'Rahman. Certificate of service date 10/26/01. [98-6568, 98-6569] (blh) [98-6568 98-6569]
12/6/01	U.S. Supreme Court letter filed: petition for rehearing denied [2467605-1]. Filed in the Supreme Court on 12-03-01. (swh) [98-6568 98-6569]
12/17/01	Order of the Supreme court of Tennessee

DATE	PROCEEDINGS
	FILED: Denying the motion of the Abu-Ali Abdur'Rahman to strike the State's motion to set an execution date. [98-6568, 98-6569] (cb) [98-6568 98-6569]
1/7/02	Appellee MOTION filed to consolidate case 01-6504 with 98-6568/6569. Motion filed by William P. Redick and Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Certificate of service date 1/4/02. [98-6568, 98-6569] (blh) [98-6568 98-6569]
1/9/02	Appellant RESPONSE in opposition to Appellee's motion to consolidate case 01-6504 with 98-6568/6569 [2482480-1] filed by William P. Redick Jr., and Bradley A. MacLean. Response from Gordon W. Smith for Appellant Cross-Appellee Ricky Bell. Certificate of service date 1/8/02. [98-6568, 98-6569] (blh) [98-6568 98-6569]
1/18/02	OPINION filed denying the motion to grant a certificate of appealability. The motions that the Rule 60(b) appeal be heard initially en banc and to consolidate that appeal with pending motions in nos. 98-6568/69 are not matters which this panel can resolve, because they should be decided by the en banc court. Thus, all relief requested to this panel is denied. Decision not for publication pursuant to local rule 28(g) [98-6568, 98-6569, 01-6504]. Eugene E. Siler, Authoring Judge, Alice M. Batchelder, R. G. Cole, Circuit Judges. (yh) [98-6568 98-6569]
2/8/02	SUPPLEMENTAL MOTION of Appellee filed to consolidate for submission the following cases: 98-6568/6569 with 01-6504.

DATE	PROCEEDINGS
	Motion filed by William P. Redick and Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Certificate of service date 2/7/02. [98-6568, 98-6569] (blh) [98-6568 98-6569]
2/11/02	ORDER filed: Petitioner's motion for rehearing of nos. 98-6568/6569 is DENIED. Petitioner's motion to consolidate no. 01-6504 with nos. 98-6568/6569 is DENIED. The mandate of the court in nos. 98-6568/6569 shall issue forthwith. The order construing an ostensible Rule 60(b) motion as an application for leave to file a second habeas corpus petition and transferring it to the court of appeals is not an appealable order in no. 01-6504, which is therefore DISMISSED for lack of jurisdiction. The motions for initial hearing en banc of no. 01-6504 and for rehearing of the court's denial of a certificate of appealability in the matter are hereby DENIED. The application for leave to file a second habeas corpus petition, as transferred to this court by the district court in no. 01-6487 is DENIED. As we stated in an opinion filed in nos. 98-6568/6569; 01-6504 on 1/18/02, "...the decision of this court on appeal from the judgment of the district court did not rest upon any procedural default." With this order the court's review of nos. 98-6568/6569, 01-6487, and 01-6504 is hereby concluded. [98-6568 98-6569] also applied to 01-6487 01-6504. Eugene E. Siler, Circuit Judge, Alice M. Batchelder, Circuit Judge, R. G. Cole, Circuit Judge. (pje) [98-6568 98-6569]

DATE	PROCEEDINGS
2/11/02	MANDATE ISSUED with no cost taxed [98-6568, 98-6569] (pje) [98-6568 98-6569]

CIVIL DOCKET FOR CASE #: 01-6504

IN RE ABU-ALI ABDUR'RAHMAN,

Petitioner – Appellant,

v.

RICKY BELL,

Respondent – Appellee.

DOCKET ENTRIES

DATE	PROCEEDINGS
12/6/01	Death Penalty Case Docketed, with certificate of appealability pending. Notice filed by Appellant Abu-Ali Abdur'Rahman. Transcript needed: y (yh)
12/6/01	Appellant MOTION filed to grant a certificate of appealability and to consolidate current appeal with case numbers 98-6568/69. Motion filed by William P. Redick and Bradley A. MacLean for Appellant Abu-Ali Abdur'Rahman. Certificate of service date 12/5/01. [01-6504] (yh)
12/6/01	PETITION for en banc hearing filed by William P. Redick and Bradley A. MacLean for Appellant Abu-Ali Abdur'Rahman. Certificate of service date 12/5/01. [01-6504] (blh)
12/7/01	Copy of District Court Order filed - Court does not have jurisdiction to rule on petitioner's motion for a certificate of appealability [01-6504] (yh)
12/18/01	Supreme Court of the State of Tennessee order filed 12/11/01 denying petitioner's motion to strike the State's motion to set an execution date. A response to the motion shall be filed on or

DATE	PROCEEDINGS
	before 12/21/01. (yh)
12/19/01	Appellee RESPONSE in opposition to the motion to grant certificate of appealability, request that appeal be heard initially en banc and motion to consolidate current appeal with 98-6568/69 previously filed by William P. Redick Jr., Bradley A. MacLean . Response from Gordon W. Smith for Appellee Ricky Bell. Certificate of service date 12/19/01 [01-6504] (yh)
12/20/01	TENDERED: reply to response to the application for certificate of appealability, etc. from William P. Redick and Bradley A. MacLean for Appellant Abu-Ali Abdur'Rahman [01-6504] (yh)
1/7/02	Appellant MOTION filed to consolidate for submission the following cases: 01-6504/98-6568/69 . Motion filed by William P. Redick and Bradley A. MacLean for Appellant Abu-Ali Abdur'Rahman. Certificate of service date 1/4/02 [01-6504] (yh)
1/9/02	Appellee RESPONSE opposition filed regarding a motion to consolidate for submission previously filed by William P. Redick Jr. and Bradley A. MacLean . Response from Michael Moore and Gordon W. Smith for Appellee Ricky Bell. Certificate of service date 1/8/02 [01-6504] (yh)
1/18/02	OPINION filed denying motion to grant certificate of appealability [2468590-1]. The motions that the Rule 60(b) appeal be heard initially en banc and to consolidate that appeal with pending motions in no. 98-6568/69 are not matters which this panel can resolve, because they should be decided by the en banc court. Thus, all relief requested to this panel is denied. Decision not for publication pursuant to local rule 28(g) [01-6504]. Eugene E. Siler, Authoring Judge,

DATE	PROCEEDINGS
	Alice M. Batchelder, R. G. Cole, Circuit Judges. (yh)
2/1/02	PETITION for en banc rehearing filed by William P. Redick and Bradley A. MacLean for Appellant Abu-Ali Abdur'Rahman. Certificate of service date 1/31/02. [01-6504] (blh)
2/7/02	ADDITIONAL CITATION filed by William P. Redick and Bradley A. MacLean for Appellant Abu-Ali Abdur'Rahman. Certificate of service date 2/6/02. [01-6504] (blh)
2/11/02	ORDER filed: Petitioner's motion for rehearing of 98-6568, 98-6569 is hereby DENIED. Petitioner's motion to consolidate 01-6504 with 98-6568/6569 is hereby DENIED. The mandate of the court in 98-6568/6569 shall issue forthwith. The order construing an ostensible Rule 60(b) motion as an application for leave to file a second habeas corpus petition and transferring it to the court of appeals is not an appealable order in 01-6504, which is therefore, DISMISSED for lack of jurisdiction. The motion for initial hearing en banc of 01-6504 and for rehearing of the court's denial of a certificate of appealability in the matter are hereby DENIED. The application for leave to file a second habeas corpus petition, as transferred to this court by the district court in 01-6487 is DENIED. As we stated in an opinion filed in 98-6568 98-6569; 01-6504 on 1/18/02, "...the decision of this court on appeal from the judgment of the district court did not rest upon any procedural default." With this order the court's review of 98-6568 98-6569, 01-6487, and 01-6504 is hereby concluded. [01-6504] also applied to cases 98-6568 98-6569 and 01-6487 Eugene E. Siler, Circuit Judge, Alice M. Batchelder, Circuit

DATE	PROCEEDINGS
	Judge, R. G. Cole, Circuit Judge. (pje)
2/26/02	MANDATE ISSUED with no cost taxed [01-6504] (pje)
4/12/02	U.S. Supreme Court notice filed regarding petition for writ of certiorari, filed by Appellant Abu-Ali Abdur'Rahman. Filed in the Supreme Court on 03-19-02 , Supreme Ct. case number: 01-9094 . [01-6504] (swh)
4/25/02	U.S. Supreme Court opinion filed granting petition for writ of certiorari and leave to proceed in forma pauperis [2535142-1] filed by Abu-Ali Abdur'Rahman [01-6504] .Filed in the Supreme Court on 04-22-02 . Copies sent to:Judges Siler, Batchelder, and Cole. (swh)

CIVIL DOCKET FOR CASE #: 01-6487

In Re ABU-ALI ABDUR'RAHMAN,

Petitioner,

DOCKET ENTRIES

DATE	PROCEEDINGS
12/3/01	Application for permission to file a second or successive petition for habeas corpus Docketed. Notice filed by Petitioner Abu-Ali Abdur'Rahman. This case is a transfer from the district court. (yh)
12/5/01	Petitioner MOTION filed to hold case in abeyance pending final determination of two pending appeals: en banc pending in 98-6568/69 and appeal from denial of 60(b)motion. Motion filed by William P. Redick and Bradley A. MacLean for Petitioner Abu-Ali Abdur'Rahman. Certificate of service date 11/4/01. [01-6487] (yh)
12/20/01	Respondent RESPONSE opposition filed regarding a motion to hold case in abeyance pending final determination of two pending appeals, (1) en banc proceedings in 98-6568/69 and (2) appeal from denial of motion for relief under 60(b) previously filed by William

DATE	PROCEEDINGS
	P. Redick Jr., Bradley A. MacLean. Response from Gordon W. Smith for Appellee Ricky Bell. Certificate of service date 12/19/01 [01-6487] (yh)
12/20/01	MOTION CAUSE SUBMITTED on briefs to panel consisting of Judges Siler, Batchelder, Cole [01-6487] (max)
2/11/02	ORDER filed: Petitioner's motion for rehearing of nos .98-6568/6569 is DENIED. Petitioner's motion to consolidate no. 01-6504 with nos. 98-6568/6569 is DENIED. The mandate of the court in nos. 98-6568/6569 shall issue forthwith. The order construing an ostensible Rule 60(b) motion as an application for leave to file a second habeas corpus petition and transferring it to the court of appeals is not an appealable order in no. 01-6504, which is therefore DISMISSED for lack of jurisdiction. The motions for initial hearing en banc of no. 01-6504 and for rehearing of the court's denial of a certificate of appealability in the matter are hereby DENIED. The application for leave to file a second habeas corpus petition, as transferred to this court by the district court in no. 01-6487 is DENIED. As we stated in an opinion filed in nos. 98-6568/6569; 01-6504 on 1/18/02, "...the decision of this court on appeal from the judgment of the district court did not rest upon any procedural default". With this order the court's review of nos. 98-6568/6569, 01-6487,

DATE	PROCEEDINGS
	and 01-6504 is hereby concluded. [01-6487] also applied to cases 98-6568/6569 and 01-6504. Eugene E. Siler, Circuit Judge, Alice M. Batchelder, Circuit Judge, R. G. Cole, Circuit Judge. (pje)
4/12/02	U.S. Supreme Court notice filed regarding petition for writ of certioriari filed by the Petitioner Abu-Ali Abdur'Rahman. Filed in the Supreme Court on 03-19-02, Suprem court case number:wh)
4/16/02	U.S. Supreme Court order filed: application for stay of execution of sentence of death presented to Justice Stevens and referred to the Court is GRANTED pending the disposition of the petition for a writ of certiorari. Should the petition be denied, this stay shall terminate automatically. If petition is granted, the stay shall terminate upon the sending down of the judgment of this Court. [2536450-1]. Filed in the Supreme Court on 04-08-02. (swh)
4/25/02	U.S. Supreme Court opinion filed granting petition for writ of certiorari and granting leave to proceed in forma pauperis [2535141-1] filed by Abu-Ali Abdur'Rahman [01-6487]. Filed in the Supreme Court on 04-22-02. (swh)

Nos. 98-6568/6569, 01-6504

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ABU-ALI ABDUR'RAHMAN,
Petitioner – Appellant,
v.
RICKY BELL,
Respondent – Appellee.

Before: SILER, BATCHELDER and COLE, Circuit Judges.

SILER, Circuit Judge. This matter comes before the court on the application by Abdur'Rahman for a certificate of appealability, a request that his Fed.R.Civ.P. 60(b) appeal be heard initially en banc and a motion to consolidate his Rule 60(b) appeal with pending motions in Nos. 98-6568/6569 to withhold mandate, grant a rehearing en banc, and remand. For the reasons stated hereafter, insofar as we have the authority, the motions are denied.

His application for a certificate of appealability arises from the transfer by the district court of this matter after he had applied for relief from judgment under Fed.R.Civ.P. 60(b). Petitioner moved the district court for relief from judgment under Rule 60(b) based upon the fact that Tennessee Supreme Court Rule 39 was just adopted on June 28, 2001, in which it stated:

> In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies

> respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tenn. Code. Ann. § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

The petitioner raised it in a Rule 60(b) motion because this case was appealed to the Tennessee Supreme Court after 1967 and the district court in this case found that certain claims were barred by the failure of the petitioner to seek discretionary review from the Tennessee Supreme Court. *See Abdur'Rahman v. Bell*, 999 F. Supp. 1073, 1080-82 (M.D. Tenn. 1988). The district court properly found that a Rule 60(b) motion is the equivalent of a successive habeas corpus petition, *see McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996), so it transferred this case to our court for a determination of whether the Rule 60(b) motion satisfied the gateway criteria of 28 U.S.C. § 2244(b).

We consider that this is the equivalent of a successive habeas corpus petition, so it is necessary to determine whether the petition meets the criteria of 28 U.S.C. § 2244(b)(2). Abdur'Rahman has not been able to meet these criteria. First, he does not rely upon a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court. Second, there is no factual predicate for the claim which could not have been discovered previously through the exercise of due diligence. Finally, he does not show that the facts underlying the claim would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found him guilty of the offense charged. Instead, his argument rests upon a state procedural rule, adopted three years after the district

court's judgment. The district court properly found that the claims were then unexhausted for failure to present them before the Tennessee Supreme Court under the authority of *Silverburg v. Evitts*, 993 F.2d 124, 126 (6th Cir. 1993). In addition, the decision of this court on appeal from the judgment of the district court did not rest upon any procedural default. *See Abdur'Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000).

Therefore, the application for a certificate of appealability is denied. The motions or requests that the Rule 60(b) appeal be heard initially en banc and to consolidate the Rule 60(b) appeal with pending motions in Nos. 98-6568/6569 are not matters which this panel can resolve, because they should be decided by the en banc court. Thus, all relief requested to this panel is denied.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 98-6568/6569,01-6504

ABU-ALI ABDUR RAHMAN,
Petitioner – Appellant.
v.
RICKY BELL, Warden,
Respondent – Appellee.

ORDER

Before: SILER, BATCHELDER, and COLE, Circuit Judges

These cases are before the court upon the motions of the petitioner to withhold issuance of the mandate in Nos. 98-6558/6569, the appeal and cross-appeal from the decision of the district court on the application for a writ of habeas corpus, and to rehear the cases en banc or remand to the district court for further proceedings. Petitioner has also moved that the court hear en banc No. 01-6504, his appeal from the judgment of the district court finding his Rule 60(b) motion to be a second or successive habeas corpus petition subject to 28 U.S.C.§2244 and transferring it as such to this court, and to consolidate it with the pending motions in Nos. 98-6568/6569, the latter request having been the subject of a supplemental motion filed February 8, 2002. Additionally, petitioner has asked for rehearing en banc of the panel's January 18, 2002 order denying, inter alia, his request for a certificate of appealability in No. 01-6504; petitioner has supplemented that request for en banc review with a statement of additional authority. Finally, petitioner has applied for leave to file a new habeas corpus petition in No. 01-6487.

The requests for en banc consideration have not been favored by a majority of the active judges of the court, and

the matter is referred to the original panel. Upon consideration of the pleadings noted above, it is the decision of the court that:

Petitioner's motion for rehearing of Nos. 98-6568/6569 is hereby DENIED

Petitioner's motion to consolidate No. 01-6504 with Nos. 98-6568/6569 is hereby DENIED

The mandate of the court in Nos. 98-6568/656 shall issue forthwith

The order construing an ostensible Rule 60(b) motion as an application for leave to file a second habeas corpus petition and transferring it to the court of appeals is not an appealable order in No. 01-6504, which is therefore DISMISSED for lack of jurisdiction

The motions for initial hearing en banc of No. 01-6504 and for rehearing of the court' denial of a certificate of appealability in the matter are hereby DENIED

The application for leave to file a second habeas corpus petition, as transferred to this court by the district court in No. 01-6487, is DENIED. As we stated in an opinion filed in Nos. 98-6568/6569; 01-6504 on January 18, 2002, "...the decision of this court on appeal from the judgment of the district court did not rest upon any procedural default."

With this order the court's review of Nos. 98-6568/6569, 01-6487, and 01-6504 is hereby concluded.

IT IS SO ORDERED.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:96-0380

ABU-ALI ABDUR'RAHMAN
V.
RICKY BELL, Warden

ORDER

Pending before the Court is Petitioner's Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b) (Docket No. 254). Because the Motion is a second or successive petition subject to 28 U.S.C. § 2244, this case is transferred to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631 and *In re Sims*, 111 F.3d 45 (6th Cir. 1997).

Petitioner, in this capital habeas corpus case, has moved pursuant to Fed. R. Civ. P. 60(b) for relief from this Court's Judgment of April 8, 1998 (Docket Nos. 205 and 206). *Abdur'Rahman v. Bell*, 999 F.Supp. 1073 (M.D. Tenn. 1998), *aff'd. in part and rev'd. inpart*, 226 F.3d 696 (6th Cir. 2000), *cert. denied*, 122 S.Ct. 386 (2001), *pet. for reh'g pending*. The Rule 60(b) Motion is predicated upon a new Tennessee Supreme Court Rule, Rule 39 ("Rule 39"), adopted on June 28, 2001.[1]

[1] Tennessee Supreme Court Rule 39 reads as follows:

In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for a rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tennessee Code Annotated, § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

In the 1998 Judgment, this Court ruled that certain of Petitioner's claims had not been exhausted in state court and, therefore, were defaulted. Based on new Rule 39, Petitioner asserts that a petition for discretionary review by the Tennessee Supreme Court is not necessary for exhaustion purposes and, therefore, the claims in question were exhausted and the Court must now rule on the merits of those claims.

Respondent asserts that this Rule 60(b) Motion is actually a second or successive petition subject to 28 U.S.C. § 2244. The proper procedure, according to Respondent, is for this Court to transfer the matter to the Sixth Circuit for its determination of whether the Rule 60(b) Motion satisfies the gateway criteria of 28 U.S.C. § 2244(b). Respondent relies primarily on *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996). In *McQueen*, the Sixth Circuit held "[w]e agree with those circuits that have held that a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition...." *Id. See, also, United States v. Rich*, 141 F.3d 550, 551 (5th Cir. 1998); *Thompson v. Calderon*, 151 F.3d 918, 921 (9th Cir. 1998) (en banc); *Felker v. Turpin*, 101 F.3d 657, 660-61 (11th Cir. 1996); and *United States v. Hernandez*, 158 F.Supp.2d 388, 391 (D. Del. 2001).

Petitioner argues that this Rule 60(b) Motion is not a second or successive petition because it raises no new claims, no new facts, and does not rely on new law. Petitioner relies primarily on *Rodriguez v. Mitchell*, 252 F.3d 191, 198-200 (2nd Cir. 2001). In *Rodriguez*, the Second Circuit held "a Motion under Rule 60(b) to vacate a judgment denying

habeas is not a second or successive habeas petition and should therefore be treated as any other motion under Rule 60(b)." *Id.* at 198.

In the Sixth Circuit, when a petitioner raises new matters in a Rule 60(b) Motion challenging the previous denial of a § 2254 habeas corpus petition, the Rule 60(b) Motion must be construed as an attempt by the petitioner to file a second or successive petition. *McQueen v. Scroggy*, 99 F.3d at 1334-35. 28 U.S.C. § 2244(b)(3)(A) provides: "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."

Because this Rule 60(b) Motion presents a new theory predicated on a new rule of law adopted by the Tennessee Supreme Court over three years after this Court's Judgment, the Court finds that the Motion is a second or successive habeas petition subject to 28 U.S.C. § 2244. Accordingly, this Court is without jurisdiction to decide the Rule 60(b) Motion. The case is hereby transferred to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631 and *In re Sims*, 111 F.3d 45 (6th Cir. 1997).

It is so ORDERED.

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:96-0380

ABU-ALI ABDUR'RAHMAN
V.
RICKY BELL, Warden

ORDER

Pending before the Court is Petitioner's Application for Certificate of Appealability (Docket No. 269). For the reasons described herein, the Court is without jurisdiction to rule on the Application.

By Order (Docket No. 267) entered on November 27, 2001, the Court ruled that it was without jurisdiction to decide Petitioner's Rule 60(b) Motion because the Motion was a second or successive petition subject to 28 U.S.C. § 2244. The Court, accordingly, ordered the case transferred to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631 and *In re Sims*, 111 F.3d 45 (6th Cir. 1997).[1]

Petitioner's Application for Certificate of Appealability asks the Court to grant a certificate of appealability. See 28 U.S.C. §§ 2253(c); Fed. R. App. P. 22(b); *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). According to Petitioner:

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[1] The Court also notes that this case was on appeal at the time the Rule 60(b) Motion was filed in this Court and that it remains on appeal at this time. Therefore, the Court generally lacks jurisdiction over the case due to the appeal. See *First Nat'l Bank of Salem Ohio v. Hirsch*, 535 F.2d 343 (6th Cir. 1976) regarding the procedure for a District Court to act on a Rule 60(b) motion to vacate a judgment that is on appeal.

> Specifically, a COA should issue because reasonable jurists could disagree (and have disagreed) with this Court's conclusions that: (1) Every 60(b) motion in a habeas case is a second or successive petition; (2) Tennessee Supreme Court Rule 39 is a "new" rule of law; and (3) Abu-Ali Abdur'Rahman is not entitled to relief, despite egregious prosecutorial misconduct, including deliberate falsification of evidence pivotal to the death sentence.

Application, Docket No. 269, p. 1.

For the reasons stated in the prior Order (Docket No. 267), the Court finds that it does not have jurisdiction to rule on Petitioner's Application for Certificate of Appealability.

The Clerk shall send a copy of this Order to the Clerk of the Sixth Circuit Court of Appeals.

It is so ORDERED.

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:96-0380

ABU-ALI ABDUR'RAHMAN
v.
RICKY BELL

ORDER

Petitioner, Abu-Ali Abdur' Rahman, has been sentenced to death by electrocution for first degree murder. He has filed a Petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging both his conviction and sentence. The Court held an evidentiary hearing in this matter beginning on February 6, 1998. For the reasons set forth in the accompanying Memorandum, the Court issues the writ of habeas corpus as to Petitioner's death sentence, but denies issuance of the writ as to Petitioner's conviction.

Accordingly, the Court vacates Petitioner's sentence of death, and remands this case to the State of Tennessee for further proceedings not inconsistent with this opinion. Petitioner shall remain incarcerated as described in the Memorandum.

It is so ORDERED.

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:96-0380

ABU-ALI ABDUR'RAHMAN
v.
RICKY BELL

MEMORANDUM

I. Introduction

Petitioner, Abu-Ali Abdur' Rahman[1], has been sentenced to death by electrocution for first degree murder. He has filed a Petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging both his conviction and sentence. The Court held an evidentiary hearing in this matter beginning on February 6, 1998. For the reasons set forth below, the Court issues the writ of habeas corpus as to Petitioner's death sentence, but denies issuance of the writ as to Petitioner's conviction.

The basis of the Court's opinion, as is described in detail herein, is that Petitioner was unconstitutionally sentenced to death because he did not receive the effective assistance of counsel guaranteed by the Sixth Amendment. This Court, along with the state post-conviction trial and appellate courts, finds that trial counsel for Petitioner failed to adequately represent their client. This Court further finds that Petitioner was seriously prejudiced by utterly ineffective assistance of counsel at his sentencing hearing. Trial counsel, for instance, failed to investigate and inform the jury about Petitioner's unstable mental history and bizarre family background. The

[1] Petitioner has changed his name from James Lee Jones to Abu-Ali Abdur'Rahman.

jury, as a result, did not hear significant mitigating evidence before deciding whether to sentence Petitioner to death. This is not to suggest that Petitioner, or anyone with an unstable mental history or bad childhood, cannot be sentenced to death. However, a sentence of death must be imposed in accordance with the Constitution and in this case was not. This is not a case where counsel presented the jury with most of the available mitigation evidence and merely missed some evidence. This is not an instance of harmless error. Despite an abundance of mitigating evidence, there was virtually a complete failure by counsel to present a defense to the jury at Petitioner's sentencing. Accordingly, as is more fully discussed in Section VIII, Ineffective Assistance of Counsel, the Constitution has been violated and the writ of habeas corpus must issue as to Petitioner's death sentence.

II. Proceedings in the State Courts

Petitioner was tried and convicted of first degree murder, assault with intent to commit murder, and armed robbery. (Addendum 1, at 2000). After a subsequent sentencing hearing, Petitioner received the death penalty for the first degree murder conviction. The jury found the existence of three aggravating circumstances: (1) Petitioner had been convicted of prior violent felonies (assault with a deadly weapon and second degree murder); (2) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (3) the murder was committed while the Petitioner was engaged in committing or attempting to commit a first degree murder or robbery. (Addendum 1, 1986-2001). The court sentenced the Petitioner to life on each of the other offenses, to be served consecutively to each other. (Addendum 1, at 13-14)[2].

[2] The court also determined that, if the death sentence were to later be reduced to a life sentence, that sentence would be served consecutively to the other life sentences. (Addendum 1, at 14). In addition, the state sentences would be served consecutively to the federal sentence for which

Petitioner was represented at trial by Lionel Barrett and Sumter Camp. After trial, Mr. Barrett and Mr. Camp withdrew, and the state court appointed Richard Dinkins to represent Petitioner on direct appeal to the Tennessee Supreme Court. (Addendum 1, Technical Record, at 87). The Tennessee Supreme Court affirmed Petitioner's conviction and sentence. *State v. Jones*, 789 S.W.2d 545 (Tenn. 1990).

The state court appointed another attorney to assist Mr. Dinkins in the post-conviction proceedings, who was joined by a volunteer lawyer from the Capital Case Resource Center. (Addendum 11, Technical Record, at 23, 50, 82). The post-conviction trial court found trial counsel had been ineffective in their representation of Petitioner at sentencing. (Addendum 11, at 81-109). The court, however, went on to find that trial counsel's deficiencies did not result in prejudice to the Petitioner and rejected all other claims. *Id.* The Tennessee Court of Criminal Appeals[2] affirmed that judgment, and the Tennessee Supreme Court denied Petitioner's application for permission to appeal. *Jones v. State*, 1995 WL 75427, at *2 (Tenn. Crim. App. Feb. 23, 1995).

The post-conviction trial court gave the following summary of facts in its opinion:

> The facts are that petitioner and his codefendant, Harold Deval Miller, went to the victims home. Petitioner wants to describe the events that took place after that as a misguided attempt to rid the community of drug dealers, as it appears that the victim, Patrick Daniels, was a small time marijuana dealer. Codefendant, Mr. Miller, testified for the State, however, and he described the motive for the visit as

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Petitioner was on parole when he was convicted of the state offenses. (*Id.*)

[2]The panel consisted of only two judges, rather than the usual three judges.

robbery. The victim, Patrick Daniels, lived with Norma Norman. Petitioner and Miller entered the home and bound Daniels and Norman. What happened next is described in the appellate decision.

> The victim in this case was bound, gagged, and blind folded with duct tape. He was distressed, crying, and begging not to be hurt. Defendants stood over him and stabbed him six (6) times, four (4) times penetrating the heart. He then watched as the victim went into convulsions, blood spewing from his nose and mouth. His accomplice testified, "he was working himself up on a rhythm," he was "cool" and "under control." The victim continued to plead with the defendant as he was being stabbed.
>
> *State v. Jones*, *supra*, at 550. The defendant also stabbed Norma Norman numerous times, but she miraculously survived the attack.

(Addendum 11, 83-84).

III. Proceedings in this Court

Prior to the evidentiary hearing in this case, the Court denied Petitioner's motion for summary judgment on his claims that the trial court's sentencing instructions regarding the heinous, atrocious, or cruel aggravating circumstance, and unanimity (Amended Petition, ¶¶ C7(l), (4), (C8)) were unconstitutional. (Docket Nos. 123, 124). The Court granted summary judgment to the Respondent on the following claims: the *Batson* challenge (Amended Petition, at ¶ C2(2)); exclusion of jurors based on religious beliefs (¶¶ C2(3),(4)); failure to exclude certain jurors for cause (¶ C2(5)); sufficiency of evidence of robbery and first degree murder (¶ C3); inadequate proportionality review (¶ C9); prosecutor's questions during guilt phase (¶ D4); prosecutorial misconduct

involving publication of indictments to jury (¶ D6); cross examination of Petitioner at sentencing (¶ D7); and State's argument at sentencing regarding the Southeastern Gospel Ministry (¶ D8(4)). (Docket Nos. 156, 157). The Court denied summary judgment on Petitioner's conflict of interest and ineffective assistance of counsel claims, having found the existence of a factual dispute. (*Id.*) The Court denied Respondent's motion for summary judgment on procedural default issues because Petitioner raised factual issues regarding actual innocence in response to the motion. (Docket Nos. 133, 134).[4]

IV. Procedural Defenses

A. Generally

Respondent argues that the Court should not reach the merits of several of Petitioner's claims because Petitioner failed to raise those claims in state court, and has, therefore, procedurally defaulted those claims. Petitioner argues that none of his claims are procedurally defaulted because: (1) all the claims Petitioner raises have been presented to the state courts; (2) the ineffectiveness of Petitioner's counsel in the state courts and prosecutorial misconduct provide cause for any failure to raise a claim; and (3) Petitioner is actually innocent of the crime for which he has been convicted, and of the death penalty.

Subsections (b) and (c) of 28 U.S.C. § 2254 require a habeas corpus petitioner to exhaust the remedies available to him in state court before raising claims in federal court. If the petitioner has no remedy currently available in state court, however, the exhaustion requirement is satisfied. *Gray v. Netherland*, 518 U.S. 152, 116 S.Ct. 2074, 2080 (1996); *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 1068-69, 103 L.Ed.2d 334 (1989).

[4] Respondent also filed a Motion in Opposition to an Evidentiary Hearing (Docket No. 110), which the Court denied. (Docket No. 116).

Although a claim may be fully exhausted under these circumstances, the petitioner's failure to assert the claim in state court may constitute procedural default. *Id.* As a general rule, procedural default bars the petitioner from raising claims in a federal habeas corpus proceeding that he failed to raise in state court. *Id.* A petitioner may avoid this procedural bar by showing cause for the default, and that prejudice resulted from the default, or by showing that he is actually innocent. *Id.*; *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995).

B. Exhaustion

First, Petitioner argues that his claims are not procedurally defaulted because they have all been exhausted. Exhaustion requires that petitioners "fairly presen[t]" federal claims to the state courts to provide them with an opportunity to correct alleged violations of its prisoners' federal rights. *Picard v. Connor*, 404 U.S. 270, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971). A claim has been "fairly presented" if the petitioner identified the specific constitutional guarantee allegedly violated, as well as a statement of the facts which entitle the petitioner to relief. *Gray*, 116 S.Ct. at 2081.

It is not enough to make a general reference to a constitutional guarantee as broad as due process to present the substance of such a claim to a state court. *Gray*, 116 S.Ct. at 2081.

Petitioner argues that many of his claims[5] are exhausted because the Tennessee Supreme Court had the independent

[5] Those claims are as follows: whether the indictments against Petitioner violated his Fifth, Eighth and Fourteenth Amendment rights (Amended Petition, ¶ C1); whether Petitioner was denied his rights under the Sixth, Eighth and Fourteenth Amendments because he was not permitted to question potential jurors in voir dire regarding their beliefs about parole eligibility (¶2(l)); whether the evidence was sufficient to support Petitioner's conviction of assault (¶ C3(3)); whether the trial court erred in instructing the jury that it could return a verdict finding Petitioner guilty of either premeditated murder, felony murder, or both ¶C4(l)); whether voir dire, arguments and instructions to the jury

duty to review each claim that could be based upon the record on appeal even if the claim was not raised by the Petitioner. Petitioner cites Tennessee Code Annotated Section 39-2-205(a), which was in effect at the time of Petitioner's trial, to support his argument.

That statute provided for automatic direct review by the Tennessee Supreme Court where the death penalty has been imposed. Tenn. Code Ann. § 39-2-205(a). The statute required that the court review the death sentence to determine: (1) whether the sentence was imposed in an arbitrary fashion; (2) whether the evidence supported the findings of an aggravating circumstance(s); (3) whether the evidence supported the finding of the absence of any mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance(s) so found; and (4) whether the death sentence is disproportionate to the penalty imposed in

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unconstitutionally defined the elements of premeditation and deliberation in a manner that violated Tennessee law (¶ C4(2)); whether the trial court erred instructing the jury regarding lesser included offenses (¶ C4(3)); whether the trial court erred by failing to instruct the jury that accomplice testimony must be corroborated by independent evidence (¶ C4(4)); whether the trial court gave an erroneous definition of reasonable doubt in its instructions to the jury by use of the language "moral certainty" (¶ C4(5); ¶ C7(3)); whether Tennessee law unconstitutionally prohibits presentation of certain specified issues at a capital sentencing hearing (¶ C5); whether the trial court unconstitutionally instructed the jury regarding the felony murder aggravating circumstance (¶ C7(2), ¶ C8); whether the trial court unconstitutionally instructed the jury that sympathy could not be a factor in its sentencing decision (¶ C7(5)); whether the sentencing instructions as a whole were unconstitutional (¶ C6); whether jury instructions regarding mitigating circumstances at the sentencing phase of the trial were unconstitutional (¶¶ C7(6),(7),(8),(9),(10),(11),(12),(13),(14),(15)); whether the Tennessee Death Penalty Statute is unconstitutional (¶ C10); whether the prosecution made improper closing argument at the guilt phase of trial regarding the term "pure pleasure" (¶ D5(4)); and whether the prosecution's argument during sentencing violated Petitioner's constitutional rights (¶¶ D8(1)-(3),(5)-(8)).

similar cases. Tenn. Code Ann. § 39-2-205(c) (repealed and replaced by Tenn. Code Ann. § 39-13-206(c)(1)).

The Court is not persuaded that this statute excuses the requirement that the Petitioner present issues to the state courts in the first instance, at least with respect to issues not specifically delineated in the statute. Accepting Petitioner's argument would essentially eviscerate the exhaustion requirement because defendants would have no incentive to raise issues in the state court, The exception Petitioner advocates would also undermine the principles of comity and federalism upon which the exhaustion requirement is based. *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 2554-55, 115 L.Ed.2d 640 (1991). Accordingly, the statutory requirement that the Tennessee Supreme Court review a death sentence does not satisfy the exhaustion requirement as to those issues not addressed in the statute.[6]

Petitioner argues that the exhaustion doctrine does not require a petitioner to seek discretionary review of a claim before the state's highest court. Petitioner argues that presentation of claims to the Tennessee Court of Criminal Appeals on appeal of the denial of his post-conviction petition was sufficient for purposes of exhaustion because that was the last court to which he was entitled to appeal as of right. Although there is a split of authority on the issue, *see Dolny v. Erickson*, 32 F.3d 381, 383-84 (8th Cir. 1994)(and cases cited therein), the Sixth Circuit has held that a petitioner must seek discretionary review of a claim from a state's highest court in order to satisfy the exhaustion requirement. *Silverburg v. Evitts*, 993 F.2d 124, 126 (6th Cir. 1993). That the Tennessee Supreme Court exercises only discretionary review of post-conviction matters, therefore, does not excuse the Petitioner from raising his claims before that court.[7]

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[6] Respondent does not allege that Petitioner's claims that track the statute are procedurally defaulted.

[7] Petitioner contends that his ineffective assistance of appellate counsel claim (Amended Petition, ¶ F) is exhausted based on this

Petitioner argues other claims are exhausted for various reasons. First, Petitioner argues that he has exhausted his claim that the evidence at trial was insufficient to support his conviction of assault by presenting it to the Tennessee Supreme Court in his application for discretionary review, (Amended Petition, ¶ C3(3)). Petitioner contends that he presented this claim to the court because it is related to his argument that the evidence was insufficient to support premeditation and deliberation, in that both claims involve Petitioner's condition at the time of the offense. The Court is not persuaded, however, that this claim was fairly presented to the court simply because Petitioner's mental state was a basis for both claims. Thus, Petitioner's sufficiency of the evidence supporting assault claim has not been exhausted.

With respect to his claim that voir dire, arguments and instructions to the jury unconstitutionally defined the elements of premeditation and deliberation (Amended Petition, (¶ C4(2)), Petitioner argues that he raised the substantial equivalent of this claim by arguing that the evidence was insufficient to support a finding of premeditation or deliberation under *State v. Brown*, 836 S.W.2d 530 (Tenn. 1992), a case involving jury instructions on these elements. Resolving a sufficiency of the evidence claim, however, does not require a court to determine whether the court erred in its jury instructions. This claim was not fairly presented to the state court, and therefore, has not been exhausted.

Petitioner next argues that he has exhausted his claim that the trial court erred by failing to instruct the jury that accomplice testimony must be corroborated by independent evidence (Amended Petition, ¶ C4(4)). Petitioner contends that he raised the substantial equivalent of this claim by arguing to the Tennessee Supreme Court on direct appeal that it was fundamentally unfair to predicate his first degree

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argument. Given the Court's rejection of this argument, the exhaustion doctrine applies to bar this claim.

murder conviction solely on the basis of the uncorroborated testimony of co-defendant Harold Devalle Miller. But, as stated above, resolving Petitioner's fundamental fairness claim would not require the court to review the jury instructions on this particular issue. Accordingly, this claim was not fairly presented to the state courts, and has not been exhausted.

Petitioner argues that his claim challenging the constitutionality of the Tennessee Death Penalty Statute (Amended Petition, ¶ C10) was raised on direct appeal to the Tennessee Supreme Court, because he stated in his brief:

> D. As Applied To The Facts Of This Case, The Imposition Of The Death Penalty Constitutes A Deprivation Of Due Process of Laws. Equal Protection Of Laws And Cruel And Inhuman Treatment In Violation Of The Fifth, Eighth And Fourteenth Amendments To The United States Constitution And Article I, Sections Eight And Sixteen Of The Tennessee Constitution And, Further, Is Disproportionate To The Sentence Imposed In Similar Cases
>
> In addition to the arguments set forth in Section II A, B, C and D, *supra*, defendant submits that, taking this case as a whole, the imposition of the death penalty was improper and constitutes a deprivation of life without due process of law and cruel and inhuman treatment. . .

(Brief of the Appellant, at 59 (Addendum 2)). The brief then goes on to address the proportionality issue.

Despite the language in the heading, the brief does not specify, "as applied to the facts of this case," why the death penalty statute is unconstitutional, and what facts support the constitutional challenge. Under these circumstances, the Court concludes that Petitioner did not fairly present his constitutional challenge to the Tennessee Supreme Court on direct appeal.

Petitioner also points out that he challenged the "heinous, atrocious and cruel" aggravating circumstance in his post-conviction application for permission to appeal to the Tennessee Supreme Court. In a footnote, the brief states: "By discussing only the aggravating circumstance of 'heinous, atrocious or cruel,' *infra*, the Appellant does not waive any previously raised constitutional challenges. The Appellant relies on the arguments previously advanced and ruled upon in his Brief to the Court of Criminal Appeals." (Application For Permission To Appeal, at 21 n. 11 (Addendum 15)).

Although the Petitioner referred, in this footnote, to the brief he filed in the Court of Criminal Appeals, he did not attach a copy of that brief to the Application. The Court is not persuaded that referral to arguments made in another document by way of a footnote constitutes a fair presentation of those arguments to the Tennessee Supreme Court. Thus, the Court concludes that this claim has not been exhausted.

In his Amended Petition, Petitioner alleges a number of instances of prosecutorial misconduct, numbered one through eight, with several subissues under each number. In a paragraph under the main heading "Prosecutorial Misconduct," Petitioner states that the prosecution "pursued a consistent course of deception," which violated Petitioner's constitutional rights (Amended Petition, (¶ D)). Respondent has asserted a procedural default defense to most of the claims set forth under this heading.

Petitioner argues, however, that the heading "prosecutorial misconduct," along with the paragraph following that heading, constitute a separate claim to which the Respondent has not asserted a procedural default defense. But the Court does not view this paragraph as a separate claim. The paragraph does not allege specific constitutional violations, nor does it set forth specific facts in connection with those alleged violations. Therefore, Respondent will not be considered to have waived his procedural default defense to the prosecutorial misconduct claims.

For this same reason, the Court rejects Petitioner's argument that certain specific allegations are not defaulted because they fall within this general prosecutorial misconduct claim.[8]

Petitioner contends that his claims regarding the failure to disclose co-defendant Miller's pretrial statements (Amended Petition, ¶¶ D1(2)-(4)) were fairly raised to the Tennessee Supreme Court in his application for permission to appeal because, in that application, he argued that the prosecution made misleading statements in its argument to the jury. (Application For Permission To Appeal, at 9 (Addendum 15)). The Petitioner also argued that the prosecution committed discovery violations, but did not mention Miller's pretrial statements.

The Court is not persuaded that this discovery violation claim has been fairly presented to the Tennessee Supreme Court. Determining whether a prosecutor has made a misleading closing argument is not the same as determining whether the prosecution committed a discovery violation. Thus, Petitioner has not exhausted this claim.

Petitioner next contends that he has exhausted his claim that the prosecution provided misleading statements to the

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[8] These claims include: whether the prosecution should have disclosed the statements of Norman's children (¶ D1(5)), the redacted portion of Detective Garafola's Report (¶ D1(6)), other police reports (¶ D1(8)), the memorandum in the prosecution's file concerning a bank account in Patrick Daniels' name (¶ D1(9)), the statement of George Daniels/laboratory reports (¶¶ D1(10)(11)), and information regarding Petitioner's bank account (¶ D1(12)). 'These claims also include whether the prosecution unconstitutionally influenced Harold Devalle Miller's testimony (¶ D2(l)); whether the prosecution provided false information to MTMHI (¶ D2(2)); whether the prosecution improperly attempted to manipulate Norma Norman's testimony (¶ D2(3)); whether the prosecution unconstitutionally misled defense counsel regarding Petitioner's 1972 murder conviction (¶ D3); whether the prosecution made improper closing arguments at the guilt phase of trial (¶¶ D3(l)-(4)); and whether the prosecution's argument during sentencing violated Petitioner's constitutional rights (¶¶ D8(l)-(3),(5)-(8)).

Middle Tennessee Mental Health Institute ("MTMHI"). (Amended Petition, ¶ D2(2)). Petitioner argues that he raised this claim in his application for permission to appeal to the Tennessee Supreme Court by reciting the facts upon which the claim is based. Although Petitioner discussed the prosecutor's letter to MTMHI in the "Statement of the Facts" section of the application, he did not raise this issue in arguing that the prosecution had engaged in misconduct. (Application For Permission To Appeal, at xii-xiii, 7-19 (Addendum 15)). The prosecutorial misconduct claims presented to the Tennessee Supreme Court were limited to Petitioner's allegations that the prosecution failed to disclose certain documents in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and that the prosecution made a misleading closing argument. (*Id.*) Although Petitioner alleged facts regarding the prosecution's letter to MTMHI, he did not identify the constitutional violation allegedly shown by those facts. Thus, this claim was not fairly presented to the Tennessee Supreme Court, and has not been exhausted.

Respondent argues that Petitioner's ineffective assistance of counsel claim is procedurally defaulted except as to the claim that defense counsel conducted a deficient investigation of Petitioner's mental history (Amended Petition, ¶¶ E1-E2(g)). Petitioner raised the ineffective assistance of counsel claim in his post-conviction petition, and described twenty-seven alleged deficiencies by defense counsel. (First Amended Petition For Post-Conviction Relief, at 3-6 (Addendum 11)). As noted above, the trial court held that defense counsel conducted an inadequate investigation of Petitioner's background and mental health history, but determined that Petitioner was not prejudiced by that deficiency. (Memorandum and Order of the Fifth Circuit Court For Davidson County (Addendum 11)). The Court of Criminal Appeals agreed with that assessment. *Jones v. State*, 1995 WL 75427 (Tenn. Crim. App. Feb. 23, 1995).

In his application for permission to appeal to the Tennessee Supreme Court, Petitioner argued that prejudice had been shown. (Application For Permission To Appeal, at 1-6 (Addendum 15)). Because Petitioner succeeded in demonstrating that trial counsel's performance was deficient in the lower courts, it was not necessary for the Petitioner to raise all those deficiencies again in arguing that his appeal of the prejudice issue should be accepted. The Court concludes that Petitioner fairly presented the ineffective assistance of counsel claims to the Tennessee Supreme Court.[9]

In conclusion, the only claims that have been exhausted by Petitioner and remain to be decided by this Court are: Petitioner's prosecutorial misconduct claims involving certain lab reports and the transcript from Petitioner's 1972 murder trial (Amended Petition, ¶¶ D1(1)(7)), and Petitioner's claim that his trial counsel provided constitutionally ineffective assistance (Amended Petition, ¶¶ A, E1-E2(g)).[10] With the exception of these claims, Petitioner has failed to exhaust all the claims to which Respondent has asserted a procedural default defense. Petitioner may no longer present those claims to the state court, however, because they would be barred by the statute of limitations. *See* Tenn. Code Ann. § 40-30-202.[11] Thus, because Petitioner has no remedy

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[9] For the same reason, the Court also concludes that Petitioner has exhausted his claim that trial counsel failed to test the adversarial process. (Amended Petition, ¶ A).

[10] Respondent has asserted a procedural default defense as to Petitioner's claim that the cumulative effect of all errors at trial violated Petitioner's due process rights. (Amended Petition, ¶ B). In his brief, Petitioner indicates that this is not a separate claim for habeas relief, but is an argument to be considered in determining whether the state court's alleged errors should be considered harmless. Therefore, the Court will not consider this argument as a separate claim.

[11] Section 40-30-202(a) is part of the Post-Conviction Procedure Act of 1995, Tenn. Code Ann. §§ 40-30-201, *et seq*. With some exceptions not applicable here, Section 202(a) provides that a petition for post-conviction relief must be brought within one year of the date of the final action of the highest state appellate court to which an appeal is taken.

currently available in state court, these claims are procedurally defaulted. *See Hannah v. Conley*, 49 F.3d 1193, 1196-97 (6th Cir. 1995).

C. Cause and Prejudice

Petitioner argues that even if his claims are the subject of procedural default, the default should be excused because he can establish cause for the default, and that prejudice resulted from the default. Petitioner also argues that the default should be excused to prevent a fundamental miscarriage of justice in that he is actually innocent.[12]

In order to establish cause, a petitioner must show the procedural default was the result of ineffective assistance of counsel, or "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). A petitioner may rely on ineffective assistance of counsel to establish cause only if he has presented that claim to the state courts as an independent constitutional claim, and he shows that counsel's incompetence rises to the level of a constitutional violation. 106 S.Ct. at 2645-46.

In order to demonstrate that an objective impediment provided cause for a procedural default, a petitioner may

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The previous post-conviction statute required that a petition be filed within three years of the date of the final action of the highest state appellate court to which an appeal was taken. Tenn. Code Ann. § 40-30-102 (repealed 1995).

The Tennessee Supreme Court denied Petitioner's petition to rehear, on direct appeal, on May 14, 1990. (Addendum 7). Therefore, Petitioner would be barred, under either statute, from seeking to raise these claims through a post-conviction proceeding in state court.

[12] Petitioner also argues that certain state procedural rules should not prevent adjudication of claims by this Court. It does not appear, however, that Respondent relies on state procedural rules to bar Petitioner's claims. Instead, Respondent argues that the claims at issue were not raised at all in the state courts. *See Teague*, 109 S.Ct. at 1069; *Coleman v. Thompson*, 111 S.Ct. at 2557 n. 1.

show, for example, that "the factual or legal basis for a claim was not reasonably available to counsel," or that "'some interference by officials'" made compliance with the procedural rule impracticable. *Murray*, 106 S.Ct. at 2645 (citations omitted).

The cause and prejudice standard applies to claims that were defaulted on appeal as well as those defaulted at trial. *Murray*, 106 S.Ct. at 2646.

In this case, Petitioner has presented an independent ineffective assistance of trial counsel claim that is not procedurally defaulted. Petitioner has not specified, however, any errors made by trial counsel that prevented any issues from being raised on appeal. In other words, in reviewing Petitioner's case on direct appeal, the Tennessee Supreme Court did not dismiss any of Petitioner's claims based on the failure of trial counsel to preserve those issues at trial. *See State v. Jones*, 789 S.W.2d 545 (Tenn. 1990).

Petitioner may not establish cause by alleging the ineffectiveness of appellate counsel in failing to present certain issues on appeal because this claim has not been presented to the state courts. (*See* Footnote 7, and accompanying text).[13]

Finally, Petitioner may not establish cause by alleging that post-conviction counsel were ineffective in failing to raise certain issues to the state courts. There is no constitutional right to an attorney in state post-conviction proceedings, and therefore, a petitioner cannot claim constitutionally ineffective assistance of counsel regarding those proceedings. *Coleman*, 111 S.Ct. at 2566.[14]

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[13] In any event, the Court notes that a defendant does not have a constitutional right to have every nonfrivolous issue raised on appeal. *See Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 3312-14, 77 L.Ed.2d 987 (1983).

[14] Furthermore, Petitioner has stated that he "is no longer pursuing the issue of ineffective assistance of post-conviction counsel."

Petitioner also argues that cause is established by the "widespread prosecutorial abuse and judicial bias" which tainted the trial and prevented post-conviction counsel from gaining "an adequate picture of the circumstances surrounding the crime and Petitioner's life." (Petitioner's Memorandum In Response To Respondent's Summary Judgment Motions And In Support Of An Evidentiary Hearing, at 50 (Docket No. 113)). Petitioner does not, however, specify how failure to raise a particular claim on direct appeal or during the post-conviction proceeding was impeded by the prosecution or the state court trial judge. Under these circumstances, the Court is not persuaded that an objective impediment prevented Petitioner from presenting claims to the state courts.

In conclusion, Petitioner has not demonstrated cause for his procedural default. Consequently, the Court need not determine whether prejudice resulted from the procedural default.

D. Actual Innocence

A petitioner who is unable to demonstrate cause and prejudice for a procedural default may nonetheless avoid a procedural default bar by demonstrating that he is actually innocent. *Murray*, 106 S.Ct. at 2649. In order to fall within the actual innocence exception to the procedural default bar, a petitioner must provide evidence that negates an element of the crime for which he was convicted, or demonstrates that he was not eligible for the death penalty under the applicable state law. *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514, 2521-22, 120 L.Ed.2d 269 (1992).

A petitioner who claims he is actually innocent of the crime for which he was convicted must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup*, 115 S.Ct.

(Petitioner's Response To Motion To Compel Disclosure Of Documents From His State Court Attorneys' Files, at 2 (Docket No. 140)).

at 867 (quoting *Murray v. Carrier*, 106 S.Ct. at 2649-2650). "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* This standard requires "a stronger showing than that needed to establish prejudice." *Id.* (footnote omitted).

To be credible, this claim of actual innocence "requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial." *Schlup*, 115 S.Ct. at 865.

In order to establish actual innocence of the death penalty, a petitioner must provide "clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner" eligible for the death penalty under the applicable state law. *Sawyer*, 112 S.Ct. at 2517. In order to make this showing, the petitioner must focus on those elements which render a defendant eligible for the death penalty, *e.g.*, aggravating circumstances, and not on additional mitigating evidence that was not introduced at sentencing. *Sawyer*, 112 S.Ct. at 2523.

Petitioner claims he is actually innocent of first degree premeditated murder based on (1) the testimony of a forensic pathologist regarding blood splattering at the scene of the stabbings; (2) the testimony of a psychiatric expert that Petitioner was insane at the time of the stabbings, and lacked the capacity to deliberate and premeditate; and (3) the lack of credibility of the testimony of the co-defendant, Harold Devalle Miller. Petitioner also claims he is actually innocent of felony murder because there was insufficient proof of the underlying felony -- theft.[15]

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[15] Although he mentions it in his brief, Petitioner does not appear to have asserted a freestanding actual innocence claim (that execution of one who is actually innocent violates the Eighth Amendment) in his Amended Petition. In any event, the standard for this claim is even higher than that

First, Petitioner argues that certain blood splattering evidence supports his claim of actual innocence. At the hearing in this Court, Petitioner presented the testimony of Dr. Kris Sperry, a forensic pathologist, who opined that the assailant would have had blood from the victims' wounds splattered on his body and his clothing. (Transcript of Hearing Beginning on February 6, 1998 ("Transcript"), at 37-38, 77). Petitioner points out, however, that crime lab reports indicate there were no blood stains found on clothes, a coat and two pair of work pants, seized from the Petitioner's apartment two days after the stabbings. (Lab Report, Petitioner's Exhibit 117; Search Warrant, Petitioner's Exhibit 115).

On the other hand, there is no evidence that during the stabbings, Petitioner was wearing the clothes later seized from his apartment. Norma Norman testified that Petitioner was wearing a black coat when he arrived at the apartment. (Addendum I, at 1342-1343). Because Petitioner taped her eyes before the stabbings were committed, however, she could not testify that he was wearing the coat during the stabbings. (Addendum I, at 1375-1378). There was no evidence that he was wearing one of the two pair of pants seized from his apartment two days after the stabbings, or that he had not disposed of the pants worn during the crime.[16]

Although this evidence may have provided a good argument for defense counsel to raise to the jury, the Court is not convinced that reasonable jurors probably would not have convicted Petitioner if they had been presented with this evidence.

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set forth in *Schlup*. Therefore, the Court is not persuaded that Petitioner has established actual innocence as a separate claim. *Schlup*, 115 S.Ct. at 860-62; *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993); *Carriger v. Stewart*, 132 F.3d 463, 476-77 (9th Cir. 1997).

[16] Petitioner's failure to dispose of his coat may be explained by his fondness for the coat, which was given to him by his wife as a birthday gift. (Addendum I, at 1454-1455).

Moreover, both Dr Sperry and Petitioner conveniently overlook the fact that Petitioner admitted that he was guilty at the sentencing phase of the trial:

> ... But what I am saying is, I'm going to submit to the fact that I am the individual that committed these particular felonies or assaults upon these two people. But I don't remember -- you know, I don't remember too much of why that all of a sudden came to me. All I know is that I'm the man that stabbed Mr. Daniel Patricks (sic) and I'm the man that assaulted Ms. Norma Jean Norman.

(Addendum I, at 1865).

> The only thing that I can recollect is that, when I was over there on this young lady and realized that what I was doing -- I had stopped. The purpose to me, you know, I didn't want -- go over there to hurt nobody. But it was her that I seen underneath me that made me stop. And God spared her life. And after that I left.

(Addendum I, at 1866-67).

> Q. And you heard Mr. Miller testify from the very seat that you're in right now, that you were the man who stabbed Mr. Daniels to death. And you knew it when you were setting there, that that was true, didn't you?
>
> A. That I was the man, yes.

(Addendum I, at 1893. See also Addendum I, at 1894, lines 7-10; 1957, lines 18-19; 1961, lines 22-25; 1968, lines 19-23).

Next, Petitioner argues that the testimony of Dr. Robert Sadoff supports his claim of actual innocence. Dr. Sadoff opined that, at the time of the stabbings, Petitioner was insane because he lacked the substantial capacity to conform his conduct to the requirements of the law. (Transcript at

523-524).[17] Dr. Sadoff testified that Petitioner was suffering from Post-Traumatic Stress Disorder, which is a mental illness. (Transcript at 455, 457). Dr. Sadoff also diagnosed Petitioner as having a Borderline Personality Disorder, a mental disorder. *Id.*

The Court is not persuaded that Dr. Sadoff's testimony is sufficient to meet the *Schlup* actual innocence standard. First, Dr. Sadoff s diagnosis comes almost twelve years after the crime, and Dr. Sadoff admitted that the passage of time made it more difficult for him to render a diagnosis. (Transcript at 584-585). On the other hand, a mental evaluation of the Petitioner conducted shortly after the stabbings found that Petitioner was competent to stand trial, and that an insanity defense could not be supported. (Petitioner's Exhibit 150). The evaluation was performed by the staff of MTMHI after observing the Petitioner over a thirty-day period in residence. *Id.* Dr. Craddock, who was a member of the MTMHI team that evaluated Petitioner, testified at the hearing in this case. (Transcript at 83-163). Although the MTMHI staff did not possess all the Petitioner's previous institutional records at the time they made their diagnosis, that diagnosis should not be given less weight than one made twelve years later.

In addition, Dr. Sadoff s opinion is based primarily on Petitioner's claim that he could not remember the stabbings. (Transcript at 569). Consequently, Dr. Sadoff opined that Petitioner was probably "dissociating" at the time of the stabbings. (Transcript at 517-518). As a result, according to Dr. Sadoff, if Petitioner was dissociating, he lacked substantial capacity to conform his conduct to the requirements of the law, or to engage in premeditation and deliberation. (Transcript at 523-524, 564).

But Petitioner has not always professed an inability to recall the stabbings. The MTMHI records indicate that

[17] This was the applicable standard for establishing an insanity defense under Tennessee law at the time of Petitioner's trial. *See, e.g., State v. Clayton*, 656 S.W.2d 344, 346 (Tenn.1983).

Petitioner stated he "remembers everything that happened" at the time of the stabbings. (MTMHI Staff Conference Report dated February 19, 1987, Petitioner's Exhibit 150; Transcript at 97). Nor has Petitioner adhered to the same story. Shortly after his arrest, Petitioner claimed that a third party, Sam Blackstock, was involved in the stabbings. (Transcript at 210-212). That story turned out to be false. (*Id.)* Finally, although Petitioner insists that the Court should not rely on Petitioner's testimony during the sentencing hearing, Petitioner clearly admitted his guilt at that time. (Addendum I, at 1865-1867; 1893-1894; 1957; 1961; and 1968). Because Dr. Sadoff's opinion strongly relies on the questionable, self-serving statements of the Petitioner, the Court does not attach a great deal of weight to that opinion.[18]

Petitioner also argues that he is actually innocent because the testimony of co-defendant Miller, which indicated that Petitioner committed the stabbings pursuant to a preconceived plan, is not credible. But this argument is not supported by any "new" evidence, as contemplated by *Schlup*, 115 S.Ct. at 865. *See also McCoy v. Norris*, 125 F.3d 1186, 1190-91 (8th Cir. 1997). Furthermore, the Court is not persuaded that pointing out every inconsistency in Miller's testimony would have led the jury to change its verdict. *See Sawyer*, 112 S.Ct. at 2524 (evidence "brought forward to impeach a prosecution

[18] These would include the statements made by the Petitioner while under hypnosis. Dr. Sadoff admitted that there is no way to determine whether the statements made by the Petitioner while under hypnosis are objective fact. (Transcript at 504-505, 507, 508, 572, 575). The Court notes that Petitioner did not testify at the hearing to memories purportedly recalled during hypnosis.

During the hearing, the Court held that the hypnosis tape offered by the Petitioner was admissible for the limited purpose of establishing what Dr. Sadoff relied upon in forming his opinion. (Transcript at 505-516). The Court also determined that the hypnosis tape did not satisfy the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and declined to admit the statements made on the tape for the truth of the events leading up to and include the stabbings. *(Id.)*

witness will seldom, if ever, make a clear and convincing showing that no reasonable juror would have believed the heart of [the witness'] account of petitioner's actions"). In other words, Petitioner has failed to show that "no reasonable juror" would have voted to find him guilty in light of Miller's credibility problems.

Petitioner also fails to present new evidence regarding the robbery. Instead, Petitioner argues that none of the witnesses saw the Petitioner take $300 from the apartment, and that it was just as plausible, based on the evidence, that someone else had taken the money. As the Court has determined in a previous Order (Docket Nos. 156, 157), although the evidence was circumstantial, it was still sufficient to allow the jury to find the elements of robbery beyond a reasonable doubt. Consequently, Petitioner has failed to show that "no reasonable juror" would have voted to find him guilty in light of Petitioner's arguments regarding the lack of sufficient evidence.

Petitioner also argues that this new evidence also shows he is actually innocent not only of the crime, but also of the death penalty. As discussed above, the *Schlup* Court has pointed out that the standard for establishing actual innocence of the death penalty, set forth in *Sawyer*, is stricter than that required to show actual innocence of the capital crime. The stricter standard requires Petitioner to provide clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him eligible for the death penalty. For the reasons explained above, the Court concludes that Petitioner has not shown actual innocence of the death penalty.

Because Petitioner has not established cause and prejudice, or actual innocence, he may not avoid the procedural default of the claims to which Respondent has asserted a procedural default defense. Accordingly, the Court will only address the following claims: Petitioner's prosecutorial misconduct claims involving certain lab reports

and the transcript from Petitioner's 1972 murder trial (Amended Petition, ¶¶ D1(1), (7)), and Petitioner's claim that his trial counsel provided constitutionally ineffective assistance (Amended Petition, ¶¶ A, E1-E2(g)).

V. The Trial Court's Instructions Regarding the "Heinous. Atrocious or Cruel" Aggravating Circumstance and Unanimity

Prior to the hearing in this case, the Court denied Petitioner's motion for summary judgment on his claims that the trial court's sentencing instructions regarding the heinous, atrocious, or cruel aggravating circumstance, and unanimity (Amended Petition, ¶¶ C7(l), (4), C8) were unconstitutional. (Docket Nos. 123, 124). For the reasons stated in that opinion, those claims are without merit, and are dismissed.

VI. Brady Violations

As noted above, two of Petitioner's *Brady*[19] claims have been exhausted and are properly before this Court. Petitioner claims that the prosecution should have provided trial counsel with the transcript of his trial in 1972 for murder because, he contends, it would have supported an insanity or mental illness defense. (Amended Petition, ¶¶ D1 (1)). Petitioner also claims that the prosecution should have provided the crime lab analysis indicating that no blood was found on the clothes seized from Petitioner's apartment. (Amended Petition, ¶¶ D1 (7)).

In a series of cases beginning with *Brady v. Maryland*, 83 S.Ct. at 1196-97, the Supreme Court has held that the prosecution must disclose exculpatory evidence to the defense, with or without request. *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Suppression of this evidence violates due process if

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[19] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

the evidence is material either to guilt or to punishment, regardless of the good faith of the prosecutor. *Id.*

Withheld evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 105 S.Ct. at 3383. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. 105 S.Ct. at 3384. A showing of materiality does not require the defendant to show that the suppressed evidence would have resulted in the defendant's acquittal. 105 S.Ct. at 3383-84. Materiality is concerned with whether suppression of the evidence undermines confidence in the outcome of the trial. 105 S.Ct. at 3381.

The Supreme Court recently reaffirmed this standard for determining materiality in *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 1567-68, 131 L.Ed.2d 490 (1995). The Court pointed out that "materiality" is not a sufficiency of the evidence test, which would require a defendant to show insufficient evidence to convict after discounting the inculpatory evidence in light of the undisclosed evidence. 115 S.Ct. at 1566. Rather, the defendant must show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* (footnote omitted).

The Court explained that in considering materiality, a reviewing court is to assess the collective effect of the suppressed evidence in light of the evidence presented at trial. 115 S.Ct. at 1567. Finally, the Court pointed out that, once constitutional error is found under this standard, there is no need for further harmless-error review because the error cannot be found harmless. 115 S.Ct. at 1566-67.

On appeal of the denial of Petitioner's state post-conviction petition, the Tennessee Court of Criminal Appeals considered this issue as follows:

> Appellant next contends that his conviction and sentence were the result of prosecutorial misconduct

because the state failed to provide him with exculpatory material as required by *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In order to establish a violation of Brady, appellant must prove (1) the prosecutor suppressed evidence, (2) that the suppressed evidence would have been favorable to the defendant and (3) the materiality of the suppressed evidence.

The evidence claimed to have been suppressed consisted of the transcript of the defendant's 1972 federal murder trial, lab reports on clothing seized from appellant's apartment, a police report about appellant's violent behavior at the time of his arrest, statements by his accomplice, Harold Devalle Miller, a police report suggesting that property belonged to one victim rather than the other, and information relative to the appellant's bank account. None of the above evidence was favorable to the defense. We find no merit to the appellant's claim of prosecutorial misconduct.

Jones v. State, 1995 WL 75427, at *3 (Tenn. Crim. App. Feb. 23, 1995).

Whether a *Brady* due process rights violation has occurred presents a mixed question of law and fact which is reviewed de novo. *Brown v. Cain*, 104 F.3d 744, 750 (5th Cir. 1977); *Reese v. Delo*, 94 F.3d 1177, 1183 (8th Cir. 1996); *Hays v. Alabama*, 85 F.3d 1492, 1498 (11th Cir. 1996).

In 1972, Petitioner was tried in a Virginia federal court for the murder of a fellow prisoner, Michael Stein. (Petitioner's Exhibit 131). He was convicted of second degree murder. (Exhibit 105). At that trial, a psychiatrist, Dr. Asot M. Masri, opined that Petitioner had been in a "homosexual panic" when he stabbed Stein.[20] (Petitioner's Exhibit 131, at 48). He

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[20] Dr. Masri characterized homosexuality as a mental disease. (Petitioner's Exhibit 131, at 51).

testified that the Petitioner had a Borderline Personality Disorder and Schizoid Personality. (Petitioner's Exhibit 131, at 53). The Government called another psychiatrist, Dr. Robert Eardley, who opined that Petitioner was not suffering from a mental disease when he stabbed Stein. (Petitioner's Exhibit 131, at 57-58, 59, 66).

Petitioner argues that this evidence was exculpatory because the State argued at trial that Petitioner did not suffer from any emotional disturbance.

There is no dispute that the prosecutor had this transcript in his possession at some point before trial began. There is also no dispute that he did not provide the transcript to the defense.[21] Respondent contends that the state court was correct in concluding that the transcript was not favorable to the defense because neither psychiatrist opined that the Petitioner was insane.

The Court believes this information was favorable to the Petitioner because the Petitioner had stated his intention to rely on a mental illness defense at trial and sentencing (Transcript at 959-60, 963), and Dr. Masri's testimony

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[21] During the hearing, the prosecutor explained his reasoning:

> Based on all the testimony, I concluded for two reasons, one the lapse of time or I guess you might say the distance in time between the two events and what I call very weak testimony from the defense psychiatrist at the trial, that it was not exculpatory, would have no bearing on explaining whether at the time of this crime he had a mental illness or suffered from any kind of emotional snapping, because the situation in the federal prison was one where even taken in light most favorable to the defendant was triggered as a result of a sexual assault on him.
>
> That wasn't the case here where the defendant sought out the victim and went to the victim and pursued the victim.

(Transcript at 10 15-16).

As for mitigation, the prosecutor testified that his interpretation of the psychological testimony was that during the previous killing, the Petitioner "got angry and snapped." (Transcript, at 1016). There was no evidence, according to the prosecutor, that there were any external circumstances operating on the Petitioner during the 1986 crime. (*Id.*)

supported that defense. The Court is not persuaded, however, that the prosecution's failure to provide the transcript to defense counsel rises to the level of a due process violation because Dr. Masri's testimony was not "material."

In a later section of this Memorandum, the Court concludes that Petitioner received ineffective assistance of counsel because his trial counsel failed to investigate his mental health history, background and other areas of mitigation. The Court is not persuaded, however, that "the proceeding would have been different" if the prosecution had disclosed Dr. Masri's testimony to Petitioner's trial counsel. Petitioner's trial counsel already had various clues that should have led them to investigate Petitioner's mental health history, such as the records of Petitioner's evaluation at MTMHl before trial, and conversations with Petitioner's wife. There is no reason that Dr. Masri's testimony should have been the key element prompting Petitioner's counsel to take action.

Similarly, admission of this testimony as an item of evidence during the guilt phase of the trial would not have affected the result. Had Petitioner's defense counsel hired an expert to opine that Petitioner was insane at the time of the stabbings in 1986, Dr. Masri's testimony about an incident in 1972 could have supported that opinion, but it certainly would not have been vital. Absent an insanity defense, there would be no reason to admit this evidence relating to a prior crime during the guilt phase of the trial.

As for the sentencing phase, Dr. Masri's testimony would have served as an item of mitigation relating both to the prior murder conviction, and to his mental history. But that testimony is only one item of evidence that, as the Court explains below, should have been introduced by trial counsel during the sentencing hearing as mitigation evidence. Standing alone, the Court is not persuaded that the absence of Dr. Masri's testimony undermines confidence in the outcome of the sentencing hearing.

As for the lab reports finding that no blood was found on clothing seized from Petitioner's apartment, there has been no evidence that the prosecutor kept this evidence from the defense. The prosecutor testified that he provided the lab reports to Petitioner's first trial counsel, Neal McAlpin, and Mr. McAlpin testified that he received them. (Transcript at 223-25, 227, 925). Furthermore, the prosecutor testified that he filed the reports with the trial court as part of his response to the Petitioner's discovery request. (Transcript at 911, 926; Supplemental Response Number Two To Defendant's Request For Discovery, Exhibit 19). Under these circumstances, the Court concludes Petitioner's *Brady* claim regarding these lab reports is without merit.

Accordingly, the Court concludes that Petitioner's *Brady* claims are without merit, and are dismissed.

VII. Trial Counsel's Conflict of Interest

Petitioner claims that one of his trial attorneys, Lionel Barrett, had an irreconcilable conflict of interest in representing Petitioner because he was paid a $5,000 retainer by Southeastern Gospel Ministry ("SEGM") member Alan Boyd to represent the Petitioner, and was promised an additional $10,000 that was never paid (Amended Petition, at ¶ El).[22] Sometime after his arrival in Nashville, Petitioner joined SEGM, a nascent religious group that had as its goal "cleaning up" the African-American community by eliminating illegal activities, primarily drug dealing. (Addendum 11, at 15-16). Petitioner's boss, Alan Boyd, co-defendant Miller, and William Beard were also members of the group. *(Id.)* Petitioner and co-defendant Miller both worked for Mr. Boyd at National Baptist Publishing.

Petitioner contends that Mr. Boyd had interests adverse to the Petitioner because Mr. Boyd and SEGM allegedly knew about and took part in the plan to visit the apartment of

[22] $5,000 was inadequate to investigate and prepare this complex case for trial.

Patrick Daniels before the stabbings, and met with the Petitioner and co-defendant Miller after the stabbings. According to the Petitioner, Mr. Boyd retained Mr. Barrett and refused to pay him the full retainer with the effect of preventing Mr. Barrett from investigating the role of SEGM and Mr. Boyd in the crime.

In order to establish a Sixth Amendment violation, the Petitioner must show that an actual conflict of interest affected his lawyer's performance. *Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 3120, 97 L.Ed.2d 638 (1987); *United States v. Mays*, 77 F.3d 906, 908 (6th Cir. 1996).[23] Whether facts give rise to a conflict of interest is a mixed question of fact and law, which is to be reviewed de novo. *Mays*, 77 F.3d at 908.

In reviewing the denial of Petitioner's post-conviction petition, the Tennessee Court of Criminal Appeals found that Mr. Barrett did not know the funds he received came from SEGM member Alan Boyd. *Jones v. State,* 1995 WL 75427, at * 3 (Tenn. Crim. App. Feb. 23, 1995). Petitioner argues that this finding is not fairly supported by the record because Gail Hughes Mann, who delivered the money to Mr. Barrett, testified at the post-conviction hearing that she told Mr. Barrett that the money came from Mr. Boyd. (Addendum 11, at 13).

Both Mr. Barrett and Ms. Mann testified in a hearing before this Court. Mr. Barrett was quite certain he was not aware the funds came from Mr. Boyd. (Transcript at 294, 410). Ms. Mann, on the other hand, was more tentative:

> Q. Did you tell him where the money came from?
>
> A. I don't remember that. I don't know if I told him or not. I probably did. I don't know.

[23] To the extent Petitioner argues that he is not required to show that the conflict "affected his lawyer's performance," this argument has been soundly rejected. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674 (1984); *Wilson v. Rogers*, 125 F.3d 856 (Table), 1997 WL 615767 (6th Cir. Oct. 3, 1997).

Q. In the post-conviction proceeding you testified you did tell Mr. Barrett?

A. Probably so.

Q. Can you testify to that today?

A. That I told him?

Q. Yes.

A. I don't remember. I don't know. I might have told him. If I say I told him back then, I did then tell him.

(Transcript at 1281). In her subsequent testimony, Ms. Mann was a bit more definite that she had told Mr. Barrett the source of her funds, Mr. Boyd, would not be providing any more funds. (Transcript at 1288).

Based on the testimony of Mr. Barrett and Ms. Mann, the Court concludes that Mr. Barrett was not aware that Mr. Boyd was the source of the fee, even if Ms. Mann happened to mention it in a conversation with him. Even if Mr. Barrett was aware of the source of the fee, the Court is not persuaded that it affected his representation.

Petitioner argues that the conflict of interest led Mr. Barrett to fail to request attorneys' fees and funds for expert support services. Petitioner also argues this conflict led Mr. Barrett to delay representation and to refuse to ask for a continuance.

In order to accept Petitioner's argument, the Court must find that the source of Mr. Barrett's fees had interests contrary to Petitioner's interest. But, as noted above, the Petitioner himself testified at sentencing that SEGM did not order him to commit the crimes for which he was convicted.

Moreover, even if Mr. Boyd's interests were adverse to Petitioner, Mr. Barrett certainly did not protect the interests of SEGM or Mr. Boyd during the trial and sentencing. Mr. Barrett elicited testimony about another SEGM member, William Beard, during cross-examination of Mr. Miller at the trial. (Addendum 1, at 1527, 1567). He also elicited

testimony about SEGM from the Petitioner at the sentencing hearing, including testimony that Mr. Boyd supplied him with a shotgun, and William Beard supplied Mr. Miller with a pistol. (Addendum 1, at 1837-1848, 1855-1856).[24] Mr. Barrett also mentioned the Petitioner's connection with the group during his argument. (Addendum 1, at 1960). In addition, Mr. Barrett issued subpoenas for Mr. Boyd and Mr. Beard to appear at the trial. (Transcript at 358).

During the evidentiary hearing in this Court, in response to a question by the Court, Mr. Barrett stated:

> Your Honor, I am as certain as a person can be from something that happened 10 years ago that I absolutely had no knowledge that these funds came from Mr. Boyd.
>
> For the sake of argument only -- even if I had been told these funds came from Allen Boyd, I would have had absolutely no hesitancy in going after him in any way I could and would think he had wasted his money if that is what he was attempting to do.
>
> I am absolutely certain that there was no decision, no single issue of strategy, not one question that Mr. Camp or I asked or did not ask had anything to do with the source of the funds that came from Ms. Hughes or from Allen Boyd.

(Transcript at 410).

The Court is not persuaded that any alleged conflict of interest affected the performance of Mr. Barrett at trial or

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[24] According to co-defendant Devalle Miller's testimony at the post-conviction proceeding, Alan Boyd met with Petitioner and Miller right after the murder of Patrick Daniels, and William Beard helped Miller leave town shortly thereafter. (Addendum II at 26-30). Mr. Boyd purchased the shotgun carried by Petitioner during the murder from a gun dealer in 1983, according to a firearms trace report. (Docket No. 200).

Alan Boyd and William Beard both asserted their Fifth Amendment privilege against self-incrimination at depositions taken in this case. Boyd and Beard effectively refused to answer any questions. (Petitioner's Exhibits 148, 149).

sentencing. Accordingly, Petitioner's conflict of interest claim is without merit, and is dismissed.

VIII. Ineffective Assistance of Counsel

A. Generally

Petitioner contends that trial counsel was ineffective during the guilt phase and during the sentencing phase of his trial (Amended Petition, at ¶ E2). In order to prevail on an ineffective assistance of counsel claim, the burden is on the Petitioner to show: (1) trial counsel's performance was deficient; and (2) actual prejudice resulted from the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064-68, 80 L.Ed.2d 674 (1984); *O'Hara v. Wigginton*, 24 F.3d 823, 828 (6th Cir. 1994).

In order to demonstrate that trial counsel's performance was deficient, a petitioner must show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 104 S.Ct. at 2064. The petitioner must show that trial counsel's performance, fell below an objective standard of reasonableness, measured by "prevailing professional norms." *(Id.)*

In analyzing trial counsel's performance, the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 104 S.Ct. at 2065. The petitioner must overcome the presumption that the challenged action by counsel was sound trial strategy. *(Id.)*

One of the duties of counsel is the duty to investigate his client's case. 104 S.Ct. at 2066. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*

In order to show actual prejudice, a petitioner must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 104 S.Ct. at 2068. A reasonable probability

is a "probability sufficient to undermine confidence in the outcome." *(Id.)*

Thus, when a petitioner challenges his conviction on ineffective assistance of counsel grounds, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt about guilt. 104 S.Ct. at 2068-69. When the petitioner challenges a death sentence, the question is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that "the balance of aggravating and mitigating circumstances did not warrant death." 104 S.Ct. at 2069. In assessing prejudice, the court is to assume that "the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." 104 S.Ct. at 2068.

The ultimate question of whether Petitioner received effective assistance of counsel is a mixed question of law and fact, which is reviewed de novo. 104 S.Ct. at 2070; *McQueen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir.1996).

Petitioner's contention that his trial counsel, Lionel Barrett and Sumter Camp, were ineffective was first raised on direct appeal by Petitioner's substitute counsel, Richard Dinkins. Petitioner argued that trial counsel should have presented evidence of Petitioner's mental incapacity at sentencing. (Addendum 2, at 57-59). In addressing this claim, the Tennessee Supreme Court stated: "There is no evidence in this record or any other part of [the Petitioner's] extensive criminal record to indicate he was either incompetent to stand trial or at the time this offense was committed. There is nothing in this record to indicate a remand for a determination of defendant's mental status would be appropriate." *State v. Jones*, 789 S.W.2d at 552.

Petitioner raised this issue again in his post-conviction petition. Petitioner based his contention that counsel was ineffective on over twenty separate grounds. (First Amended Petition For Post Conviction Relief, Addendum 11). At the

post-conviction hearing, Petitioner's counsel called Petitioner's initial attorney, Neal McAlpin; trial counsel, Lionel Barrett and Sumter Camp; and appellate counsel, Richard Dinkins. (Addendum 11). Petitioner also called Gail Hughes Mann; Petitioner's co-defendant, Harold Devalle Miller; Petitioner's wife, Susi Bynum Jones; and a psychiatrist, Dr. Barry Nurcombe. *(Id.)*

The post-conviction trial court found that Petitioner's trial counsel had failed to adequately investigate Petitioner's background and mental health history. (Memorandum and Order entered August 26, 1993, Addendum 11). Specifically, the post-conviction court found that trial counsel failed to investigate as follows:

> 1. Testimony and files of trial counsel showed that few witnesses were investigated or interviewed regarding petitioner's background and mental health history.
>
> 2. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's prior psychological consultation at ages 12 to 14 while at Ft. Shafter, Hawaii.
>
> 3. Testimony and files of trial counsel showed that they failed to investigate and obtain readily available information concerning petitioner's psychological assessment at age 14 by the school psychologist at DuPont Jr. High School at Ft. Lewis, Washington.
>
> 4. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's juvenile incarceration for being a psychopathic delinquent at Western State Hospital in Tacoma, Washington.
>
> 5. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning the petitioner's school records

> in Philadelphia, where on May 24, 1965 there was a request for psychological service by Sayre High School.
>
> 6. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's school records in Philadelphia, where on June 17 he was referred for Special Education.
>
> 7. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's incarceration at the Annadale Institute for Boys, New Jersey, when he was 15, his being placed on psychiatric watch in January of 1967 and his referral to and psychological examination at the New Jersey State [Psychiatric] hospital at Trenton in February of 1967.
>
> 8. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's Army records at ages 17 and 18 with notations regarding his "questionable mental status," bizarre behavior, and psychiatric reports leading ultimately to discharge.
>
> 9. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's psychiatric examination at St. Elizabeth's Hospital, Washington, D.C., following his incarceration for assault on or about the day of his discharge from the Army, despite the fact that part of this information was sent to MTMHI per their request.
>
> 10. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's institutional records while in the federal prison system.
>
> 11. Testimony and files of trial counsel showed that they failed to investigate and obtain available

information concerning petitioner's psychiatric examination following petitioner's 1972 killing of a fellow prisoner while incarcerated for the assault referenced in paragraph 9 above.

12. Trial counsel has little knowledge of the facts related to the petitioner's 1972 murder conviction.

13. They failed to interview the psychiatrist and psychologist who conducted the MTMHI evaluation until after the trial began.

(Memorandum and Order entered August 26, 1993, at 5-6, Addendum 11) (footnote omitted) (emphasis in original).

The court concluded, however, that the failure to investigate did not prejudice the Petitioner because his background also contained harmful information. *(Id.)*

The Tennessee Court of Criminal Appeals agreed with the trial court's decision:

> If the trial attorneys had investigated further, they would have found that the appellant had a long history of violent behavior and anti-social personality disorders. We agree with the trial judge's finding that trial counsel were ineffective in failing to further investigate the background of the accused under the circumstances, but we also agree with Mr. Barrett's testimony and the trial judge's conclusion that it probably would not have been the most prudent trial strategy to use proof of appellant's history of violent behavior and anti-social personality disorders at either the guilt or innocence phase or at the sentencing phase of the trial.

Jones v. State, 1995 WL 75427, at *2.

During the evidentiary hearing in this Court, Petitioner called all the witnesses who testified at the post-conviction proceeding except Dr.Nurcombe and Mr. Miller. In addition, Petitioner presented, for the first time, the live testimony of Petitioner's half-sister, Nancy Lancaster; Petitioner's former fiancé Sarah Roberts Walton; co-defendant Miller's former

attorney, Ross Alderman; mental health experts, Dr. Sadoff, and Dr. Nancy McCoy; Dr. Ray Winbush; and legal expert Brian Stephenson. Petitioner also presented, for the first time, the testimony of Detective Mark Garafola, Elmer H. Bishop, William Delagrange, and Richard Bretzlauf by deposition. (Petitioner's Exhibits 110, 135, 136, 152).

During their testimony before this Court, Mr. Barrett and Mr. Camp admitted most of the deficiencies alleged by the Petitioner. Mr. Barrett was first requested to represent the Petitioner in October, 1996. (Transcript at 326). During the next month, Petitioner's initial counsel, Neal McAlpin, began to withdraw from representation. (Transcript at 233-234). Mr. Barrett did not begin actually working on the case, however, until March, 1987. (Transcript at 336-337). On April 20, 1987, Mr. Barrett first requested the help of Mr. Camp, who was an associate with Mr. Barrett's firm at that time. (Transcript at 271-272, 342, 691). Mr. Camp first began work on the file sometime after May 11, 1987. (Transcript at 691-692). Mr. Barrett took the lead in the case, and Mr. Camp's role was to assist him. (Transcript at 695 - 723). Trial was set for July 6, 1987. (Transcript at 338).

Trial counsel had three to four months to prepare for trial. The investigation they conducted during this time was wholly inadequate. Mr. Barrett admits that he did not obtain Mr. McAlpin's file in the case, or discuss the case in any kind of depth with Mr. McAlpin, even though Mr. McAlpin suggested that he do so. (Transcript at 240-242, 277, 279, 722). Because of that failure, and the subsequent failure to inspect the court file, Petitioner's trial counsel were not aware of the lab reports indicating that no blood was found on clothes seized from Petitioner's apartment. (Transcript at 277, 292, 322, 341, 331-333). Counsel also failed to respond to a request, sent to Mr. McAlpin, from MTMHI staff for background information to be used in their psychiatric evaluation of the Petitioner. (Transcript at 242-243, 331-333).

Mr. Barrett failed to request Petitioner's extensive mental health records, or his educational, prison, or military records. (Transcript at 280-281). This was a serious failure.

Although Mr. Barrett prepared a motion requesting that the trial court declare his client indigent, and approve funds for investigative and expert services, he did not file the motion. This was a significant error. (Transcript at278, 363-367, 701).[25] Mr. Barrett did not consult or hire a mental health expert to perform an independent mental evaluation of his client. (Transcript at 278, 718-719). This was a grave omission.

Mr. Barrett did not introduce any information from the MTMHI records relating to Petitioner's background or mental history at the trial or at sentencing. (Transcript 725). Trial counsel received the MTMHI records only a couple of weeks prior to the trial, and neither recall speaking with any of the MTMHI staff about their report. (Transcript at 280, 282, 352, 716717). These were substantial errors.

Petitioner's attorneys did not call anyone in Petitioner's family to testify during the sentencing hearing. Mr. Barrett testified that someone in his office contacted Petitioner's brother, Mark Jones, before trial, but he refused to assist in Petitioner's defense. (Transcript at 286-289). Mr. Camp testified that he did not contact the Petitioner's brother. (Transcript at 710). At the post-conviction hearing, Petitioner introduced an affidavit from Mark Jones[26] indicating that he had not been contacted by Mr. Barrett's office. (Petitioner's Exhibit 74; PC Exhibit 67). It is undisputed that Petitioner's attorneys did not contact Petitioner's half-sister, Nancy Lancaster, even though she would have been available and willing to testify at the time of trial. (Transcript at 832). Mr.

[25] The Motion was prepared three days after jury selection began. (Transcript at 727). A post-trial motion for indigent status was approved. (Transcript at 376; Petitioner's Exhibit 88).

[26] Mark Jones committed suicide on July 13, 1996. (Transcript at 793).

Barrett did not contact Petitioner's former fiancé, Sarah Roberts Walton, even though the Petitioner told Mr. Barrett about her. (Transcript at 356). These were significant mistakes.

Finally, Mr. Barrett failed to investigate the nature of Petitioner's prior convictions[27]. (Transcript at 281, 708-709, 714-715). This was a substantial error.

As the trial date approached, Mr. Camp suggested that they request a continuance to conduct further investigation, but Mr. Barrett did not act on that suggestion. (Transcript at 279, 705). This was a serious deficiency.

Although both these attorneys have good reputations in the bar, their performance in this case was clearly inadequate. Mr. Barrett critiqued his own performance as follows:

> I think as the trial progressed and on looking back on it now, I think that I should have sought out further psychiatric evaluation. I think it became evident during the course of the trial that Mr. Jones -- and in Mr. Camp's opinion and my opinion had some psychiatric or psychological issues we may not have fully realized early on in the case. . . Based upon the documents that I have now seen subsequent to the trial, I feel that my performance certainly did not satisfy the standards that I adhere to myself as far as pursuing the psychiatric aspect, particularly at the sentencing hearing.

[27] Mr. Barrett testified that the prosecutor introduced him to FBI Agent William Delagrange at trial, and that the agent said he would testify that Petitioner's 1972 conviction was the result of a "drug turf war," and not a homosexually-related killing, as Petitioner contended. (Transcript at 294-299). Given his failure to investigate Petitioner's prior convictions, Mr. Barrett did not have any independent information about the conviction, and therefore, did not introduce mitigating evidence about this conviction at the sentencing hearing. (Transcript at 299). As discussed herein, the 1972 conviction was not over drugs and gangs as represented by the prosecution to defense counsel. The murder concerned homosexual conduct that the jury could have found more mitigating.

(Transcript at 394-395).[28]

Mr. Camp's assessment was even more negative. He testified that he agreed with the state courts that his representation was deficient.

> We did not present the information to this jury so that they would know James Jones, so that in deciding whether he was to live or die they would know this man, they would know this human being. That was our failure.
>
> * * *
>
> ... [W]e didn't give the jury any reason to oppose death on James Jones. We didn't explain to them how James Jones came to be in that courtroom facing them.

(Transcript at 734, 741, 766).)

Thus, this Court, like the state post-conviction trial court and appeals court, finds that trial counsel's performance during the guilt phase and during sentencing was deficient. Unlike those courts, however, this Court concludes that Petitioner suffered prejudice as a result of that deficiency during the sentencing phase of this trial.

Before addressing prejudice at sentencing, the Court will consider whether trial counsel's deficiencies prejudiced Petitioner as to the guilt phase of the trial. Petitioner argues

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[28] Shortly after the trial, defense counsel realized the need to fully consider Petitioner's mental state. Mr. Barrett wrote Mr. Camp the following memorandum on August 26, 1987:

> You will get a copy of communication from James Lee Jones saying that he thinks he is going to get the Nobel Peace Prize. I think he is probably crazy. I think that we should move to have him psychiatrically evaluated prior to the sentencing hearing in view of the United States Supreme Court decision that you cannot execute a person that is crazy. I also think that in the sentencing provision in the code there is some indication that a person can be psychatrically [sic] evaluated. We need to get this done as soon as possible and I would appreciate it if you could prepare the paperwork.

(Petitioner's Exhibit 85).

he was prejudiced because trial counsel did not introduce the lab report indicating that no blood was found on clothes seized from Petitioner's apartment, and because trial counsel failed to obtain an expert to support an insanity defense.

The Court is not persuaded that if trial counsel had presented the lab report to the jury, they would have had a reasonable doubt about guilt. As discussed above, there is no evidence that Petitioner was wearing the clothes seized from his apartment during the stabbings.[29]

Similarly, the Court is persuaded that trial counsel's presentation of a mental health expert to testify on behalf of the Petitioner would have left the jury with a reasonable doubt about Petitioner's guilt. It is not clear that trial counsel would have found an expert to testify that Petitioner was insane at the time of the stabbings. As noted above, Dr.Sadoff's opinions that Petitioner was insane at the time of the offense comes some twelve years after the crime. Furthermore, any testimony to this effect would have been countered by the prosecution with MTMHI's opinion that there was no basis for Petitioner to invoke an insanity defense. Thus, the Court concludes that Petitioner suffered no prejudice at the guilt stage as a result of trial counsels' deficiencies.

As for sentencing, however, the Court concludes that there is more than a reasonable probability that, had trial counsel introduced the mitigation evidence they would have had available after a reasonable investigation, the result of the sentencing would have been different. The Court is of the opinion that the complete lack of mitigation evidence at sentencing undermines confidence in the outcome of the sentencing.

In evaluating the prejudice at sentencing, it is important to keep in mind the nature of mitigation evidence during the

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[29] Petitioner also ignores the fact that he admitted his guilt at sentencing. (Addendum I, at 1865, lines 5-12; 1866, line 25 through 1867, line 6; 1893, lines 4-8; 1894, lines 7-10; 1957, lines 18-19; 1961, lines 22-25; 1968, lines 19-23).

sentencing proceeding. In the "eligibility" phase of the sentencing proceeding, the jury narrows the class of defendants "eligible" for the death penalty, generally by determining whether certain well-defined aggravating circumstances are applicable to the case. *Buchanan v. Angèlone*, ___ U.S. ___, 118 S.Ct. 757, 761, ___ L.Ed.2d ___ (1998); *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 1764-65, 64 L.Ed.2d 398 (1980). During the "selection" phase, the jury determines whether to impose the death penalty on a particular defendant. *Buchanan*, 118 S.Ct. at 761. In regard to making this "selection" decision, the Supreme Court has "emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination." *Id.* Indeed, the Court has consistently held that "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." *Id.*

Mitigating evidence relevant to the selection decision includes "'any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 2946, 106 L.Ed.2d 256 (1989). As the Supreme Court has explained: "If a sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" 109 S.Ct. at 2947 (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987)). The sentencing decision should reflect "a reasoned moral response to the defendant's background, character, and crime." *Id.*

Thus, there is a broad array of evidence that is considered to be relevant to mitigation. In addition, the rules of evidence do not apply to the presentation of that evidence. During the

relevant time period, Tennessee Code Annotated Section 39-2-203 (c) provided:

> In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i) below; and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection shall not be construed to authorize the introduction of evidence secured in violation of the Constitution of the United States or of the state of Tennessee.

(Exhibit 155).[30] Consequently, Petitioner's counsel were not constrained by evidentiary restrictions in introducing mitigation evidence at sentencing.

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[30] Thus, this Court has used a similar standard in determining whether prejudice has been established in light of the evidence that could have been admitted at the sentencing hearing. In that regard, the Court notes that Rule 7 of the Rules Governing Section 2254 Cases provides that the habeas corpus record may be expanded "by the inclusion of additional materials relevant to the determination of the merits of the petition." Habeas Corpus Rule 7(a). The Rule indicates that copies of letters, documents, exhibits, and affidavits may be included in the expanded record. Habeas Corpus Rule 7(b). The court "may require" the authentication of material added to the record under the Rule. Habeas Corpus Rule 7(d). Thus, Rule 7 contemplates a relaxed application of the hearsay, best evidence, authentication, and other evidentiary rules under the Federal Rules of Evidence, Liebman, *Federal Habeas Corpus Practice and Procedure*. § 19.5, at 532 (2d ed. 1994).

In this case, there was an abundance of mitigation evidence available that was never used at trial. For example, trial counsels' reasonable investigation would have produced information about Petitioner's childhood abuse by his father, a military policeman. Trial counsel could have introduced evidence about this abuse through descriptions contained in some of Petitioner's mental health records, through the testimony of Petitioner's step-sister, Petitioner's wife, Petitioner's now-deceased brother, and Petitioner's former fiancé.[31]

During the hearing in this Court, Nancy Lancaster, Petitioner's half-sister, testified about the abuse and difficulties Petitioner experienced during his childhood. (Transcript at 786, 81[illegible] 822-823, 832, 838-839). Although some of the information Ms. Lancaster related was based on statements made by other family members, the Court was very impressed with Ms. Lancaster's credibility and demeanor.

Ms. Lancaster testified that she and the Petitioner share a common mother, who abandoned Ms. Lancaster and her two brothers when she was an infant. (Transcript at 786-787). Petitioner's mother put her three children in a taxi, drove them to the woods, and left them. (Transcript at 787).[32] Petitioner's mother later married Petitioner's father, James Jones, Sr. (Transcript at 793-794). Three more children were born of that marriage -- James (Petitioner), Mark, and Sylvia.

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[31] The affidavit of Mark Jones, Petitioner's deceased brother, which was introduced at the post-conviction hearing, confirms Petitioner's statements about the abuse and other difficulties he encountered during his childhood. (Mark Jones Affidavit, ¶ 5, Petitioner's Exhibit 74). Sarah Roberts Walton and Susi Bynum testified in this Court about Petitioner's previous statements to them that he had suffered abuse as a child. (Transcript at 1191-1192; February 19, 1987 -- MTMHI Social History, Petitioner's Collective Exhibit 150).

[32] As a result, Ms. Lancaster was unable to testify as to her age or birthday. (Transcript at 787). The taxi driver went back to the woods, retrieved the children, and turned them over to the state. *Id.*

Petitioner's statements to mental health providers provide a vivid description of the abuse Petitioner suffered at the hands of his father. Petitioner received regular beatings with a leather strap from his father. (Transcript at 629-634; Petitioner's Collective Exhibit 150; February 9, 1967 -- New Jersey State Hospital, Respondent's Collective Exhibit 9). Petitioner's father made him take off his clothes, placed him hog-tied in a locked closet, and tethered him to a hook with a piece of leather tied around the head of his penis. (Transcript at 475, 631, 818; Petitioner's Collective Exhibit 150). Petitioner's father struck Petitioner's penis with a baseball bat. (Transcript at 475, 632). To punish him for smoking, Petitioner's father required him to eat a pack of cigarettes, and when he vomited, was made to eat the vomit. (Transcript at 634). None of this extraordinary abuse, which constitutes relevant mitigating evidence, was heard by the jury. This was a grave omission by defense counsel.

This, of course, is not to suggest that people who are abused as children should get away with murder. People with bad childhoods can be sentenced to death. But, the Constitution requires that these significant facts should have been presented to the jury at sentencing by counsel.

Petitioner's school and mental health records indicate that Petitioner's family lived in several different locations, and that Petitioner had undergone mental evaluations several times during his childhood. Petitioner ran away from home several times, and eventually, at 15, left home for good. (Mark Jones Affidavit at ¶ 4, Petitioner's Collective Exhibit 74; Transcript at 630).

A reasonable investigation would have produced information about Petitioner's mental history. A review of the MTMHI records, which trial counsel had in their possession before trial, would have indicated that Petitioner had had prior mental evaluations, that he had served in the army, and had spent several years in prison. (Petitioner's Collective Exhibit 150). Petitioner's school, military and

prison records reveal that Petitioner had been diagnosed in 1964 as having "paranoid personality" (December 11, 1964 -- Western State Hospital, Tacoma, Washington, Respondent's Collective Exhibit 8) and, in 1971, as having a "passive aggressive personality, aggressive type." (May 11, 1971 -- FR, Petersburg, Petitioner's Collective Exhibit 142). These records also describe the Petitioner as: "very sick" and in need of immediate commitment (November 12, 1964 -- Richard Stiles of Dupont Junior High School, Respondent's Collective Exhibit 8), "in serious need of therapy" (May 24, 1965 -- Sayre Junior High School Staff, Respondent's Collective Exhibit 7); and "highly disturbed." (December 30, 1970 -- FR, Petersburg, Petitioner's Collective Exhibit 142; Respondent's Collective Exhibit 6, Tab 8). The records also reflect numerous suicide attempts (February 9, 1967 -- New Jersey State Hospital, Respondent's Collective Exhibit 9; April 15, 1969 -- Baltimore City Jail, Respondent's Collective Exhibit 6, Tab 2; March 19, 1971 -- FR, Petersburg, Petitioner's Collective Exhibit 142; June, 1972 -- FCI, Tallahassee, Addendum 11, PC Exhibit). None of this evidence was offered to the jury. This was significant error by counsel.

Petitioner also had a family history of serious mental conditions. Petitioner's sister, Sylvia, attempted suicide on multiple occasions and was institutionalized several times for mental health problems. (Transcript at 803, 815, 626). Petitioner's brother, Mark, committed suicide while this case was pending in this Court.[33] To call the Jones family dysfunctional would be an understatement. (Transcript at 626).

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[33] Sylvia Jones, as a teenager, had a child out of wedlock by her own father according to Ms. Lancaster's uncorroborated view of the family's history. (Transcript at 793-795). The whereabouts of Sylvia Jones is unknown. Mark Jones committed suicide on July 13, 1996. (Transcript at 793). The suicide was within days of his arrest for sexually and physically abusing his children. (Transcript at 627).

Had counsel conducted an in-depth interview before calling Susi Bynum to testify at sentencing, they would have gathered more evidence regarding Petitioner's mental health. They would have learned about Petitioner's belief that he and his wife would have the next Messiah; Petitioner's having carried on conversations with nonexistent people and animals; and his having banged his head against the wall on various occasions. (Transcript at 1224, 1225, 1229, 1216).[34] Again, none of this evidence was made known to the jury. Ms. Bynum testified that she even told Mr. Barrett that he should have a psychiatrist examine the Petitioner before the trial. (Transcript at 1250). These were serious deficiencies by defense counsel.

Had trial counsel heeded Ms. Bynum's suggestion and hired a mental health professional to evaluate the Petitioner, or had they interviewed MTMHFs Dr. Craddock, they could have presented evidence that Petitioner had, at the very least, exhibited symptoms of a Borderline Personality Disorder, including extreme emotional swings, identity disturbance, and self-mutilating behavior. (Transcript at 129-132; 140). A mental health professional, like Dr. McCoy, could have offered testimony about Petitioner's background and mental history, and could have offered an explanation placing in context the negative aspects of Petitioner's past. (Transcript at 613-663). By describing Petitioner's history of earnestly seeking a religious faith with which to align himself, Dr. McCoy's testimony would have supported the notion that Petitioner had been strongly influenced by the SEGM. None of this was put into evidence before the jury. The failure of counsel to do so was a serious error.

Trial counsel could have presented testimony showing that, despite his mental health problems, Petitioner had functioned as a productive member of society during the year before he came to Tennessee. If they had heeded Petitioner's

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[34] The Court notes that the MTMHI files also revealed much of this same information. (Petitioner's Collective Exhibit 150).

suggestion that they talk with Sarah Roberts Walton, Petitioner's former fiancé, they could have learned that after Petitioner was released from prison in Chicago, in 1983, he was hard-working and giving. Ms. Walton, now an attorney for the State of Maine,[35] testified that when she knew the Petitioner in 1983, he held a steady job, attended college, and performed volunteer work with a Quaker youth group at Cabrini Green, a large, infamous public housing development in Chicago known for its poverty and violence. (Transcript at 1181, 1195-1196, 1197, 1205; Bretzlauf deposition, at 14-15, 17).[36] Ms. Walton described the Petitioner as gentle, caring, and filled with dignity; a person with whom she shared a sincere Christian belief (Transcript at 1204-1205). The jury heard nothing of the sort from any witness. This was a very significant failure by defense counsel.

The Court finds the testimony of Ms. Walton to be extremely credible. The content of her testimony, as well as her demeanor, made her a compelling mitigation witness on behalf of Petitioner for purposes of sentencing. Ms. Walton's testimony, based on personal knowledge, added a humanizing dimension to the life history and character of the Petitioner, good and bad, that was absent from any prior proceeding in state court, and yet could have been presented to the jury, had trial counsel conducted a reasonable investigation.

Had defense counsel learned more about the 1972 murder conviction, they could have presented evidence to the jury that the killing occurred when Petitioner approached the victim, Michael Stein, in his cell to confront him about spreading rumors that Petitioner had engaged in homosexual

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[35] Ms. Walton has represented the State of Maine on two murder appeals. (Transcript at 1182).

[36] Ms. Walton ultimately broke off the engagement because she was concerned that Petitioner had psychological problems. (Transcript at 1189-1190). Petitioner subsequently moved to Tennessee the year before the stabbings to be close to his brother, Mark Jones, who was stationed at Fort Campbell. (Transcript at 1195).

conduct, and that Petitioner stabbed Stein during that confrontation. (Bishop Deposition, at 22-23, 24-25, 26, Petitioner's Exhibit 135; Delagrange Deposition, at 18-19, Petitioner's Exhibit 136; Petitioner's statement dated April 2, 1972, attached as Exhibit to Delagrange Deposition, Petitioner's Exhibit 136; Letter dated April 15, 1987 from David G. Lowe to John Zimmerman, attached as Exhibit to Delagrange Deposition, Petitioner's Exhibit 136; Memo dated April 7, 1972 from H.R. Hogan to Norman A. Carlson, attached as Exhibit to Delagrange Deposition, Petitioner's Exhibit 136).[37] The prison murder was not about drugs and gangs as represented by the prosecution to defense counsel.

More importantly, Dr. Masri testified at the 1972 murder trial that Petitioner had a "homosexual panic" and lost control when he killed Stein. (Petitioner's Exhibit 131, at 48). As noted above, Dr. Masri also diagnosed the Petitioner as having a Borderline Personality Disorder and Schizoid Personality. (Petitioner's Exhibit 131, at 53). Although this information does not provide a justification for the murder, it does provide the jury with some information upon which to evaluate it. Without some information tending to mitigate this prior murder, there was nothing to alter the likely mindset of the jury that because Petitioner had killed someone before, he was not deserving of any leniency. The jury heard none of this evidence. Again, defense counsel made a substantial mistake.

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[37] In response to a claim made by Mrs. Stein after her son's death, representatives of the federal institution where he had been incarcerated took the position that:

> Mr. Stein was a member of a group of inmates who were attempting to apply extortionate pressures on Jones to submit to Stein's demands for homosexual activities. The assault itself on April 1 arose out of an attempted assault on Jones approximately two weeks earlier by members of this group.

(Petitioner's Collective Exhibit 142; Bishop Deposition, at 25, Exhibit 135).

Instead, at the sentencing hearing, the jury heard only two witnesses for the defense, the Petitioner and his wife. The defense was breathtakingly brief in content, and lacking in quality, and quantity. (Addendum 1, at 1836-1930). Petitioner's testimony on direct was essentially limited to his relationship with SEGM, his account of the events surrounding the stabbings, and a plea for his life. (Addendum 1, at 1836-1870). During cross-examination, the Petitioner initially lost his composure, and was not particularly articulate in answering the prosecutor's questions. (Addendum 1, at 1870-1905). Mr. Camp described the Petitioner's performance as "one of the saddest things I have seen in my legal career." (Transcript at 731).[38]

The only line of questioning put to Petitioner's wife, Susi Bynum Jones, related to whether she had written some bad checks before Petitioner was incarcerated. (Addendum 1, at 1919-1929).[39] Counsel did not even attempt to elicit testimony from Mrs. Jones that she loved her husband, found good in him, or hoped he would not be executed.[40]

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[38] Mr. Camp described trial counsels' deficiencies regarding Petitioner's testimony:

> It is my opinion that Mr. Jones was not prepared to go on the stand, that because of what I perceived to be his mental health problems that it would be hard for him to have been successful on the stand because we had not provided the factual foundation that the jury needed to be able to hear this man in context, that all they got was literally this man begging for his life. And it was more than he could handle and that he just broke down.

(Transcript, at 731).

[39] Even though he conducted the direct examination of the Petitioner's wife, the only mitigation witness offered besides the Petitioner, Mr. Camp did not conduct an interview with her prior to trial. (Transcript, at 724; 1248, 1250).

[40] Ms. Jones spoke effervescently about her husband at the hearing in this case. "Well, when I first met James, he opened up his mouth, it was like thunder from heaven... I was fascinated with James...he was different, just different from any man I had ever met... he wanted to do something for the world. I was intrigued by that." (Transcript, at 1216).

The jury in this case heard no witnesses who expressed a concern whether Petitioner lived or died, even though such witnesses were available and known to defense counsel. This was a grievous flaw.

As Respondent argues, and the state courts found, there was also a considerable amount of negative evidence that the prosecution could have introduced during the sentencing hearing, That evidence includes a criminal record which indicates that Petitioner was convicted of assault at the age of 15, and two more assaults at the age of 19. (Petitioner's Exhibit 105; Petitioner's Exhibit 146; Respondent's Collective Exhibit 9; Respondent's Collective Exhibit 10). As noted above, Petitioner was convicted of the second degree murder of Michael Stein at the age of 21. (Petitioner's Exhibit 105).

Petitioner has been diagnosed as having a sociopathic personality disturbance with antisocial reaction and mild depression, (March 10, 1967 -- New Jersey State Hospital, Respondent's Collective Exhibit 9), as having an anti-social personality (November 7, 1968 -Fort Meade, Maryland, Respondent's Collective Exhibit 10; June, 1977 -- USP Leavenworth, Kansas, Respondent's Collective Exhibit 6, Tab 59), and as having a psychopathic personality. (January 13, 1978 -- USP Leavenworth, Kansas, Respondent's Collective Exhibit 6, Tab 67).

Petitioner has also been diagnosed as having no mental illness. (April 15, 1969 - Baltimore City Jail, Respondent's Collective Exhibit 6, Tab 2; December 31, 1969 -- St. Elizabeth's Hospital, Respondent's Collective Exhibit 11; April, 1970 -- Dr. Angus, Respondent's Collective Exhibit 6, Tab 10 1; Dr. Eardley testimony at Stein murder trial, Petitioner's Exhibit 131, at 57-58, 59, 66).

The prosecution could have introduced evidence that during his many years in prison, Petitioner was involved in numerous citations for misconduct, including possession of a knife. (Respondent's Collective Exhibit 6). Prison records

would also show that Petitioner escaped shortly before his parole date in 1982, but was recaptured a few months later. (Respondent's Collective Exhibit 6, Tab 94). While on escape, Petitioner was a witness in a murder case.

Petitioner's army records indicate that during his service in the army, Petitioner was absent without leave on more than one occasion, and ultimately, was discharged under conditions other than honorable. (Respondent's Collective Exhibit 10).

Finally, Petitioner's school records indicate that he was suspended from school for threatening a teacher with a knife. (May 24, 1965 -- Sayre Junior High School, April 25, 1966 -- Shaw Junior High School, Respondent's Collective Exhibit 7; February 9, 1967 -- New Jersey State Hospital, Respondent's Collective Exhibit 9).

Notwithstanding this negative evidence, however, the Court is persuaded that had counsel presented the other evidence of Petitioner's background and mental history, there is more than a reasonable probability that at least one juror would have voted for a life sentence rather than the death penalty. It only takes one juror to decide that the mitigation evidence presented by the Petitioner outweighs the aggravating circumstances established by the prosecution. (Tenn. Code Ann. § 39-2-203; Exhibit 155). No mitigation evidence was presented during Petitioner's sentencing, and therefore, it is not surprising that the jury struck the balance in favor of the death penalty.

This is not a case where counsel collected and put on the significant mitigating evidence and merely failed to get everything. This is a case of no mitigating evidence -- none -- being offered to the jury despite its availability and abundance. Defense counsel was substantially ineffective and Petitioner was thereby deprived of a constitutionally fair trial.

Petitioner stated it succinctly to the jury at sentencing:

> I don't know you. You don't know me. So, it ain't no feeling there what you should do to me.

(Addendum 1, at 1869, lines 15-16).

According to the prosecutor's assessment after trial, given the paucity of evidence that was presented by Petitioner's attorneys, the jury had little reason to hesitate in imposing the death penalty: "The jurors all expressed to us their satisfaction with their verdict and were quite surprised at their own ability to impose the death penalty on this particular man with no reluctance whatsoever." (Letter dated July 17, 1987 from John Zimmerman to David G. Lowe; Petitioner's Collective Exhibit 136).

The Court acknowledges that Lionel Barrett and Sumter Camp have good reputations in the Nashville bar for being fine criminal defense lawyers. This case illustrates that lawyers do not make cases based on their reputations. A lawyer must actually work on each case. Cases are made through factual investigation, research, writing, witness preparation, trial strategy, and a bit of good fortune. In this case, the hard work required was simply not done. This Court agrees with the state post-conviction trial and appellate courts that Mr. Barrett and Mr. Camp provided inadequate representation. Good lawyers can and do fail. Here, Mr. Barrett and Mr. Camp utterly failed in their duty to adequately represent their client, who, as a result of this miscarriage of justice, was unconstitutionally sentenced to death.[41] This is not a case of harmless error.

This conclusion is not one the Court reaches casually. The Court is mindful of the importance of the sovereignty of the State of Tennessee and the need to respect the certainty and finality of court judgments. This Court has no interest in simply second-guessing the decisions of the state courts. But the overwhelming nature of the evidence presented to this Court, a significant portion of which was not presented to the

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[41] Mr. Barrett as lead counsel, and Mr. Camp as assistant counsel, each had an independent duty to provide effective assistance of counsel.

jury or the state courts,[42] and the almost complete failure to present a defense at Petitioner's sentencing hearing, compels the Court's conclusion that Petitioner's death sentence cannot stand. The Constitution of the United States, and this Court's duty to uphold its principles, mandate the issuance of the writ of habeas corpus as to Petitioner's death sentence.

IX. Conclusion

All Petitioner's claims are procedurally defaulted except Petitioner's *Brady* claims, trial counsel conflict of interest claim, the ineffective assistance of counsel claim, and those claims already addressed by the Court in previous orders. The Court concludes that Petitioner's *Brady* claims, and conflict of interest claims, are without merit, and they are dismissed.

With respect to Petitioner's ineffective assistance of counsel claim, the Court concludes that Petitioner received ineffective assistance of counsel during the sentencing phase of his trial, and therefore, Petitioner's petition for a writ of habeas corpus relief is granted as to that claim. Accordingly, the Court vacates Petitioner's sentence of death, and remands this case to the State of Tennessee for further proceedings not inconsistent with this opinion. As noted above, Petitioner is also serving two consecutive life terms for assault with intent to commit murder and armed robbery and shall remain incarcerated.

It is so ORDERED.

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

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[42] For example, Nancy Lancaster, Sarah Roberts Walton, Robert Sadoff, Diana McCoy, Kris Sperry, Raymond Winbush and Brian Stephenson were not called as witnesses in the state post-conviction proceeding.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 98-6568/98-6569

ABU-ALI ABDUR' RAHMAN,
Petitioner-Appellant
vs.
RICKY BELL
Respondent-Appellee

Appeal From The United States District Court
For The Middle District Of Tennessee
At Nashville
No. 96-00380--Todd J. Campbell, District Judge.

Argued: January 31, 2000
Decided and Filed: September 13, 2000

Before: SILER, BATCHELDER, and COLE,
Circuit Judges.

COUNSEL

ARGUED: Gordon W. Smith, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellant. Bradley A. MacLean, FARRIS, WARFIELD & KANADAY, Nashville, Tennessee, William P. Redick, Jr., Whites Creek, Tennessee, for Appellee. **ON BRIEF:** Gordon W. Smith, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellant. Bradley A. MacLean, FARRIS, WARFIELD & KANADAY, Nashville, Tennessee, William P. Redick, Jr., Whites Creek, Tennessee, Brian K.

Frazier, NEAL & HARWELL, Nashville, Tennessee, for Appellee.

OPINION

SILER, Circuit Judge. Respondent, Ricky Bell, Warden ("State"), appeals the issuance of a writ of habeas corpus to Petitioner, Abu-Ali Abdur'Rahman ("Petitioner"),[1] vacating Petitioner's sentence of death for first-degree murder on the grounds of ineffective assistance of counsel at the sentencing phase of Petitioner's trial. Additionally, Petitioner cross-appeals the denial of his petition for a writ of habeas corpus seeking relief from his conviction for first-degree murder. We reverse the district court's finding that Petitioner was prejudiced by his trial counsel's deficient performance at the sentencing stage and vacate the portion of the district court's judgment granting the petition for a writ of habeas corpus as to the death sentence. Additionally, we affirm the portion of the district court's judgment denying the petition for a writ of habeas corpus as to the conviction.

I. BACKGROUND

Petitioner was tried and convicted of first-degree murder, assault with intent to commit murder, and armed robbery. He received the death penalty for the murder conviction and two consecutive life terms for the each of the other convictions. The death sentence was imposed pursuant to the jury's finding of three aggravating circumstances: (1) the defendant was previously convicted of one or more felonies whose statutory elements involved the use of violence to the person; (2) the murder was especially heinous, atrocious or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death; and (3) the murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or

[1] Petitioner was originally named James Lee Jones, but he changed his name to Abu-Ali Abdur'Rahman.

attempting to commit, any first-degree murder, arson, rape, robbery, burglary, theft, or kidnapping. Petitioner's convictions arose out of an offense that occurred in 1986.

On February 16, 1986, Petitioner purchased a small amount of marijuana from Patrick Daniels at the duplex in which Daniels lived in Nashville, Tennessee. Petitioner and Harold Devalle Miller later agreed to rob Daniels. The plan was for Petitioner to enter the duplex under the pretext of making a drug purchase, at which point Miller would force his way into the duplex and "rob" both Daniels and Petitioner with a shotgun that Petitioner had supplied. This plan was never executed, however, as Miller became too frightened to go through with it. Petitioner then formulated a second plan to rob Daniels, this time using a knife to avoid making too much noise.

On February 17, 1986, Petitioner, armed with a shotgun, and Miller, armed with an unloaded pistol, entered the duplex under the pretext of making a drug purchase. Petitioner and Miller displayed their firearms and forced Daniels and his girlfriend, Norma Norman, to the floor. Petitioner then bound Daniels and Norman with duct tape about their hands, feet, eyes, and mouth. After stealing Daniels's bank card, Petitioner forced Daniels to reveal his PIN number. Petitioner also searched the house and found some marijuana in some sofa cushions.

Petitioner then told Daniels that he had been sent from Chicago to "clean up everything" and that he was there to teach Daniels a lesson. Petitioner obtained a butcher knife from the kitchen and stabbed Daniels six times in the chest, penetrating his heart four times. Prior to and during the stabbing, Daniels was crying and begging Petitioner not to hurt anyone. After Daniels became motionless, Petitioner stabbed Norman in the back several times, but Miller pulled Petitioner away and the two men fled, leaving the knife in Norman's back. Daniels died as the result of his wounds, but

Norman survived. Petitioner and Miller also took $300 from a box in Norman's bedroom.

At trial, Petitioner argued that the real motivation for the crime was born out of the influence of his membership in a "quasi-religious paramilitary group" called the Southeastern Gospel Ministry ("SEGM"). Petitioner had a long criminal history, including a conviction for second-degree murder in 1972 and a conviction for assault with a dangerous weapon (a knife) in 1970. Following his incarceration for these offenses, he moved to a halfway house in Nashville. While living at the halfway house he worked for an organization called the Baptist Publishing Board, and eventually met Allen Boyd, one of the Board's owners, and Boyd's associate, William Beard. Boyd and Beard were the leaders of the SEGM; Miller was also a member of the SEGM. One of the alleged goals of the SEGM was to cleanse the black community of drug dealers and other undesirable elements. Boyd allegedly furnished the shotgun used during the offense and assisted Petitioner and Miller after the offense, including giving Miller some money to flee.

Petitioner was initially represented by Neal McAlpin, who was asked by Boyd to take on the representation. Boyd allegedly indicated to McAlpin that he would be paying Petitioner's attorney's fees. However, McAlpin subsequently determined that Boyd was a member of the SEGM. With Boyd being the source of his fees, as well as perhaps being involved in the crime, McAlpin felt that a conflict of interest existed within the third-party fee arrangement and that he could not continue the representation. Gail Hughes, an associate of Boyd's, then requested that Lionel Barrett represent Petitioner. Barrett agreed to do so for a retainer fee of $15,000, $5,000 of which was paid to him fairly soon, though he never inquired as to the source of the funds. Barrett and another attorney, Sumter Camp, represented Petitioner at trial.

Petitioner alleges that this representation was ineffective throughout the trial, including both the guilt phase and the sentencing phase. Barrett testified that at the time he received the first $5,000 of the retainer he decided he was not going to perform any work on the case until he received the balance of the retainer fee, a balance that was never paid. Petitioner also claims that Barrett performed no work on the case until he filed pre-trial motions. Petitioner alleges that Barrett's performance as counsel was ineffective due to failure to: (1) investigate; (2) present potentially exculpatory evidence; and (3) present mitigating evidence at the sentencing stage.

His conviction and sentence were affirmed by the Tennessee Supreme Court in *State v. Jones*, 789 S.W.2d 545 (Tenn.), *cert. denied*, 498 U.S. 908 (1990). He sought post-conviction relief in the state trial court which conducted a hearing, made findings, and denied relief. The judgment was affirmed in *Jones v. State*, No. 01C01-9402-CR-00079, 1995 WL 75427 (Tenn. Crim. App. Feb. 23, 1995), and the Tennessee Supreme Court denied review. The United States Supreme Court denied a petition for a writ of certiorari in *Jones v. Tennessee*, 516 U.S. 1122 (1996). Petitioner later filed this petition for a writ of habeas corpus, challenging both his conviction and sentence. After Petitioner's motion for partial summary judgment was denied, the district court held an evidentiary hearing to address the merits of his habeas petition. The district court granted the writ on Petitioner's claim of ineffective assistance of counsel at the sentencing stage due to counsel's failure to present mitigating evidence despite its availability. However, the district court denied Petitioner's claim of ineffective assistance of counsel at the guilt stage, holding that although the performance of Barrett and Camp was deficient, Petitioner suffered no prejudice thereby. *Abdur'Rahman v. Bell*, 999 F.Supp. 1073 (M.D. Tenn. 1998). This is an appeal from that decision.

II. DISCUSSION

A. State's Appeal Challenging the Judgment Granting the Petition for a Writ of Habeas Corpus as to the Death Sentence

1. Presumption of Correctness Under 28 U.S.C. § 2254

The State argues that the district court improperly dispensed with the presumption of correctness that is to be accorded to state court findings of fact under 28 U.S.C. § 2254(d)[2] without providing a statement of its reasons for

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[2] 28 U.S.C. § 2254(d) (repealed), in effect when the instant petition was filed, states:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.
>
> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

doing so as required by *Sumner v. Mata*, 449 U.S. 539 (1981), and *Mitchell v. Rees*, 114 F.3d 571 (6th Cir. 1997). Petitioner responds that claims of ineffective assistance of counsel involve mixed questions of law and fact that are not accorded the presumption of correctness under *Strickland v. Washington*, 466 U.S. 668 (1984).

The post-conviction trial court held that Petitioner's trial counsel had failed to adequately investigate Petitioner's background and mental history, making the following factual findings in the process:

> 1. Testimony and files of trial counsel showed that few witnesses were investigated or interviewed regarding petitioner's background and mental health history.
>
> 2. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's prior psychological consultation at ages 12 to 14 while at Ft. Shafter, Hawaii.
>
> 3. Testimony and files of trial counsel showed that they failed to investigate and obtain readily available information concerning petitioner's psychological

assessment at age 14 by the school psychologist at Dupont Jr. High School at Ft. Lewis, Washington.

4. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's juvenile incarceration for being a psychopathic delinquent at Western State Hospital in Tacoma, Washington.

5. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning the petitioner's school records in Philadelphia, where on May 24, 1965 there was a request for psychological service by Sayre High School.

6. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's school records in Philadelphia, where on June 17 he was referred for Special Education.

7. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's incarceration at the Annadale Institute for Boys, New Jersey, when he was 15, his being placed on psychiatric watch in January of 1967 and his referral to and psychological examination at the New Jersey State [Psychiatric] hospital at Trenton in February of 1967.

8. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's Army records at ages 17 and 18 with notations regarding his "questionable mental status," bizarre behavior, and psychiatric reports leading ultimately to discharge.

9. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's psychiatric examination at St. Elizabeth's Hospital, Washington,

D.C., following his incarceration for assault on or about the day of his discharge from the Army, despite the fact that part of this information was sent to MTMHI [Middle Tennessee Mental Health Institute] per their request.

10. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's institutional records while in the federal prison system.

11. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's psychiatric examination following petitioner's 1972 killing of a fellow prisoner while incarcerated for the assault referenced in paragraph 9 above.

12. Trial counsel has little knowledge of the facts related to the petitioner's 1972 murder conviction.

13. They failed to interview the psychiatrist and psychologist who conducted the MTMHI evaluation until after the trial began.

Abdur'Rahman, 999 F.Supp. at 1093. The district court referred to these findings in its opinion partially granting habeas relief, but did not address the presumption of correctness that arguably applied to them under 28 U.S.C. § 2254. Instead, citing *Strickland v. Washington*, 466 U.S. 668, 698 (1984), and *Queen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir. 1996), it merely noted that "[t]he ultimate question of whether Petitioner received effective assistance of counsel is a mixed question of law and fact, which is reviewed de novo." *Abdur'Rahman*, 999 F.Supp. at 1092.

This was an accurate statement of the law by the district court, though not a complete one. A close reading of the relevant portion of *Strickland* indicates that while the ultimate question of ineffective assistance of counsel is a mixed question of law and fact, the factual findings of state courts

underlying such an analysis are accorded the presumption of correctness:

> **Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d),** and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a), both the performance and the prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.

Strickland, 466 U.S. at 698 (emphasis added). Thus, the state post-conviction trial court's findings of fact underlying its ineffectiveness inquiry should have been presumed correct.

This presumption is not mandatory because a district court may preclude its application upon the finding of any one of the listed exceptions in 28 U.S.C. § 2254(d). However, in order to do so "a habeas court should include in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was 'not fairly supported by the record.'" *Sumner*, 449 U.S. at 551. In the recent opinion in *Mitchell v. Rees*, this court discussed this requirement.

> We begin with the application of 28 U.S.C. § 2254(d), which establishes a presumption of correctness for factual determinations made by the state courts whose judgments are challenged by the federal habeas petitioner. The Supreme Court, in *Sumner v. Mata*, held that § 2254(d) mandated that the presumption of correctness be applied by the habeas court to a finding of the state appellate court that "'the facts of the present case' did not adequately support respondent's claim." The Court went on to lay down the rule that "a habeas court should include in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors were present, or the reasoning

> which led it to conclude that the state finding was 'not fairly supported by the record.'" The reason for this requirement, the Court explained, is that "[n]o court reviewing the grant of an application for habeas corpus should be left to guess as to the habeas court's reasons for granting relief notwithstanding the provisions of § 2254(d)." And in a footnote, the Court further explained that "the 1966 amendments embodied in § 2254(d) were intended by Congress as limitations on the exercise of [federal court] jurisdiction. As we held in *Louisville & Nashville R. Co. v. Mottley*, and have repeatedly since reaffirmed, 'it is the duty of this [C]ourt to see to it that the jurisdiction of the [district court] which is defined and limited by statute, is not exceeded.'"
>
> . . . It was error, therefore, for the district court to dispense with the presumption of correctness embodied in § 2254(d) and to order an evidentiary hearing without providing a written statement of the "reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was 'not fairly supported by the record.'"

Mitchell, 114 F.3d at 575-77 (citations omitted). Thus, the district court committed the same error by apparently dispensing with the presumption of correctness without a statement of its reasons for granting relief notwithstanding the provisions of § 2254(d).

Relying solely upon the erroneous argument that the presumption of correctness does not apply to the post-conviction trial court's findings of fact, Petitioner fails to argue that any one of the listed exceptions in § 2254(d) applies and requires that the court dispense with the presumption of correctness. However, he argues that § 2254(d)(8) would entitle him to an evidentiary hearing, pointing to evidence in the record allegedly showing that he

did not receive a full and fair hearing in state court at trial, during post-conviction proceedings, and on appeal. The State argues that due to Petitioner's formal presence before the state trial and appellate courts, his ability to call witnesses and otherwise present evidence, and his pursuit of his claims on appeal, he cannot be heard to claim that he did not receive a full and fair hearing. This position is correct. *See Andrews v. Collins*, 21 F.3d 612, 619 (5th Cir. 1994) (noting that the opportunity to present evidence, to present witnesses, and to fully cross-examine prosecution witnesses supports the finding of a full and fair hearing); *see also Sumner*, 449 U.S. at 546 (stating that "[s]ince that court [state appellate court] was requested to determine the issue by respondent [the convicted murderer], we do not think he may now be heard to assert that its proceeding was not a 'hearing' within the meaning of § 2254(d)."). Thus, because Petitioner received a full and fair hearing the presumption of correctness applies.

It is clear that the court erred in not addressing the presumption of correctness as required by *Sumner*, *Strickland*, and *Mitchell*. However, it is unclear as to whether the district court held that the presumption of correctness did not apply. This ambiguity arises because the district court ordered an evidentiary hearing and received evidence that was not presented in any of the state court proceedings. Additionally, it considered the new evidence in its opinion partially granting habeas relief to Petitioner, yet failed to explicitly find whether the new evidence contradicted and possibly rebutted the presumption of correctness, or merely supplemented the post-conviction trial court's findings of fact.

Presumably, however, because the court simply exercised de novo review under its mistaken interpretation of *Strickland* it did dispense with the presumption of correctness. Thus, the district court erred by failing to recognize that the presumption of correctness applied to the post-conviction trial court's findings of fact and erred by failing to include in its opinion the reasoning why the presumption of correctness did

not apply. Unlike *Mitchell*, however, this error does not require a remand because we hold that the district court properly ordered an evidentiary hearing and properly considered the evidence it heard.

2. Inherent Discretion to Order an Evidentiary Hearing

Applying the presumption of correctness under § 2254(d) is an entirely separate and distinct issue from whether a district court may or is required to order an evidentiary hearing to settle allegedly disputed issues of material fact. However, as a practical matter, when a district court finds that the presumption of correctness does not apply due to one of the listed exceptions in § 2254(d), a hearing is probably warranted. As discussed below, this is an issue that is independent of whether a habeas Petitioner is *entitled* to an evidentiary hearing. This latter issue is not raised by the instant appeal, because the district court properly ordered an evidentiary hearing pursuant to its inherent discretionary authority.

The district court ordered an evidentiary hearing "to resolve the numerous complex factual and legal issues presented." The State argues that the district court abused its discretion in ordering an evidentiary hearing because *Mitchell* does not allow for such a hearing in the absence of a finding of one of the § 2254(d) factors. Alternatively, it argues that Petitioner is not entitled to an evidentiary hearing due to his failure to show either cause and prejudice for the failure to develop the facts in the state proceedings or that a fundamental miscarriage of justice would result from the district court's failure to hold an evidentiary hearing. Petitioner responds by attempting to distinguish *Mitchell* and by arguing that a district court has inherent authority to order an evidentiary hearing to settle claims of ineffective assistance of counsel.

As the above-quoted portion of *Mitchell* shows, this court has held that a district court does not have the authority to order an evidentiary hearing when it fails to properly dispense

with the presumption of correctness. Additionally, this court succinctly discussed the cause and prejudice requirements that the State argues are relevant to this appeal:

> Because § 2254(d) is an express limitation on the district court's jurisdiction, a district court is without authority to hold an evidentiary hearing on a matter on which the state court has made findings unless one of the factors contained in § 2254(d) applies. It was error, therefore, for the district court to dispense with the presumption of correctness embodied in § 2254(d) and to order an evidentiary hearing without providing a written statement of the "reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was 'not fairly supported by the record.'"
>
> Once a district court has properly determined that it may dispense with the presumption of correctness mandated by § 2254(d), the court has some discretion in determining whether to hold an evidentiary hearing. However, an [sic] habeas petitioner who has not developed the record in state court is entitled to an evidentiary hearing only if he shows (1) "cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure" or (2) "that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing." Therefore, a district court abuses its discretion by ordering such a hearing without first requiring the petitioner to make the requisite showing.

Mitchell, 114 F.3d at 577 (citations omitted). Thus, strictly on the basis of *Mitchell*, because the district court did not find

that one of the factors contained in § 2254(d) applies, the court lacked the authority to order an evidentiary hearing.[3]

Petitioner argues that *Mitchell* is inconsistent with both Supreme Court authority and other authority emanating from this Circuit which recognizes that district courts always have the inherent authority to order evidentiary hearings to settle disputed issues of material fact. Petitioner cites and quotes to *Townsend v. Sain*, 372 U.S. 293 (1963), *overruled by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), for the proposition that "the power of inquiry on federal habeas review is plenary." *Id.* at 312. Although *Townsend* was partially overruled as discussed below, the Court set out six situations in which a district court on habeas review must hold an evidentiary hearing. *Id.* at 313-14. Additionally, the Court stated that:

> [t]he purpose of the test is to indicate the situations in which the holding of an evidentiary hearing is mandatory. In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge. If he concludes that the habeas applicant was afforded a full and fair hearing by the state court resulting in reliable findings, he may, and ordinarily should, accept the facts as found in the hearing. But he need not. In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim.

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[3] Petitioner attempts to distinguish *Mitchell* by arguing that the *Batson v. Kentucky*, 476 U.S. 79 (1986), challenge involved therein was based solely upon factual state court findings, whereas the instant case involves an ineffectiveness of counsel claim that was clearly a mixed finding of fact and law. In turn, Petitioner argues that because the presumption of correctness does not apply in the instant case, *Mitchell* is not applicable and therefore not controlling. However, as the above-stated conclusion shows, the presumption of correctness does apply to the post-conviction trial court's findings of fact. Thus, Petitioner's attempt to distinguish *Mitchell* is erroneous.

Id. at 318. Thus, it seems that despite the holding in *Mitchell*, a district court does have the inherent authority to order an evidentiary hearing even if the factors requiring an evidentiary hearing are absent.

This issue was further discussed in *Keeney*, which partially overruled *Townsend* by holding that the cause and prejudice test applies to a habeas petitioner's failure to develop material facts at the state court level. *See Keeney*, 504 U.S. at 5. In so holding, the Court discussed in a footnote the relation between the instances listed in *Townsend* in which a district court must hold an evidentiary hearing and the exceptions to the presumption of correctness listed in § 2254(d):

> First, it is evident that § 2254(d) does not codify *Townsend's* specifications of when a hearing is required. *Townsend* described categories of cases in which evidentiary hearings would be required. Section 2254(d), however, does not purport to govern the question of when hearings are required; rather, it lists exceptions to the normal presumption of correctness of state-court findings and deals with the burden of proof where hearings are held. The two issues are distinct, and the statute indicates no assumption that the presence or absence of any of the statutory exceptions will determine whether a hearing is held.

Id. at 10 n.5. Thus, this passage indicates the continuing viability of *Townsend's* statement that a district court may order an evidentiary hearing to settle disputed issues of material fact even following the adoption of the exceptions to the presumption of correctness listed in § 2254(d).

Thus, *Mitchell's* statement that a district court is without authority to order an evidentiary hearing in the absence of one of the exceptions listed in § 2254(d) is overbroad in that it fails to recognize the inherent authority that a district court always has in habeas cases to order evidentiary hearings to

settle disputed issues of material fact. This court has previously recognized this principle. *See Sims v. Livesay*, 970 F.2d 1575, 1579 (6th Cir. 1992) (quoting *Townsend* for the proposition that a district judge's power to receive evidence on a habeas petitioner's constitutional claim is only constrained by his sound discretion). Other Circuits have likewise recognized this inherent discretion. *See Seidel v. Merkle*, 146 F.3d 750, 754-55 (9th Cir. 1998); *Clemmons v. Delo*, 124 F.3d 944, 952 (8th Cir. 1997); *Pagan v. Keane*, 984 F.2d 61, 63-65 (2d Cir. 1993).

Of course, recognizing a district court's inherent discretion to order an evidentiary hearing is an issue that is separate and distinct from whether a habeas petitioner is *entitled* to an evidentiary hearing. As Petitioner correctly points out, *Keeney* and *Mitchell* stand for the proposition that a:

> habeas petitioner who has not developed the record in state court is entitled to an evidentiary hearing only if he shows (1) "cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure" or (2) "that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing."

Mitchell, 114 F.3d at 577 (quoting *Keeney*, 504 U.S. at 11-12). Because the district court properly ordered an evidentiary hearing pursuant to its inherent authority to do so, the issue of whether Petitioner is entitled to an evidentiary hearing is irrelevant and will not be addressed.

Following the oral arguments in this case, the Supreme Court decided *Williams v. Taylor*, 120 S.Ct. 1479 (2000), in which it interpreted the fault requirement of a provision of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 ("AEDPA"). The specific provision that was at issue states that "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the

applicant shows [the existence of two limited exceptions]." 28 U.S.C. § 2254(e)(2). While the use of the word "shall" in this provision may evidence the Congressional intent to remove a district court's inherent discretion to order an evidentiary hearing in the absence of either of the provided exceptions, this provision does not apply to the instant appeal because Petitioner filed his habeas petition on the day before the enactment of AEDPA. *See Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997) (holding that AEDPA only applies to petitions filed after the date of its enactment). While there may not be any inherent discretion to order an evidentiary hearing following the enactment of AEDPA, we decline to specifically determine whether AEDPA has so altered the law. *Williams* does not, therefore, lead to the conclusion that the district court erred below.

Additionally, although *Williams* characterized the *Keeney* decision as "requir[ing] the prisoner to demonstrate cause and prejudice excusing the default before he could receive a hearing on his claim," *id.* at 1488, the use of the word "could" does not imply that if the district court ordered a hearing based upon its inherent discretion, it erred. Thus, the distinction between when a petitioner is entitled to a hearing, which was at issue in *Keeney*, versus whether a district court has the inherent discretion to order a hearing, is still intact following *Williams*.

3. Ineffective Assistance of Counsel

Recognizing that in a habeas case a district court has the inherent authority to order an evidentiary hearing to settle disputed issues of material fact obviously raises the issue of how any evidence received by the district court is to be considered if the court holds that the presumption of correctness under § 2254(d) applies. The post-conviction trial court concluded that Petitioner's trial counsel's performance was deficient during the sentencing phase due to the failure to investigate and obtain information about Petitioner's background and mental health. However, it went on to hold

that Petitioner suffered no prejudice at the sentencing stage because the evidence that he would have offered to support a finding of mitigating circumstances was both helpful and harmful and that it would not have been a prudent strategy to present the evidence. The Tennessee Court of Criminal Appeals affirmed that decision. *See Jones*, 1995 WL 75427, at *2. The State argues that in the absence of the evidence presented at the evidentiary hearing below, the state court findings of fact show deficient performance on the part of Petitioner's trial counsel, but do not show any prejudice from that deficient performance. Petitioner responds by arguing that the state court findings of fact do show that he was prejudiced by trial counsel's deficient performance.

Strickland set forth the test for determining when the ineffective assistance of counsel so prejudices a defendant that his sentence must be set aside. First, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance of counsel under the Constitution." *Strickland*, 466 U.S. at 692. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Additionally,

> [w]hen a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Id. at 695. Finally, "[w]hen a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless.

And, the petitioner must win." *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995).

Of course, as stated above, the prejudice prong of the *Strickland* test is a mixed question of law and fact that is reviewed de novo.[4] Nevertheless, the state court findings of fact should be accorded the presumption of correctness under § 2254(d). The post-conviction trial court held that Petitioner's trial counsel had failed to adequately investigate Petitioner's background and mental history, making the factual findings set forth above in the process. Based upon these findings of fact, the post-conviction trial court found that Petitioner did not suffer any prejudice from the deficient performance, a holding that the Tennessee Court of Criminal Appeals affirmed:

> If the trial attorneys had investigated further, they would have found that the appellant had a long history of violent behavior and anti-social personality disorders. We agree with the trial judge's finding that trial counsel were ineffective in failing to further investigate the background of the accused under the circumstances, but we also agree with Mr. Barrett's testimony and the trial judge's conclusion that it probably would not have been the most prudent trial strategy to use proof of appellant's history of violent behavior and anti-social personality disorders at either the guilt or innocence phase or at the sentencing phase of the trial. As the Supreme Court of the United States noted in *Strickland v. Washington*, 466 U.S. 668, 700 (1984), "Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed." Indeed proof of the appellant's

[4] Neither party argues that any error has ever been committed with respect to the performance prong of the *Strickland* test.

> psychological history in all probability would not have changed the result, especially in light of appellant's conviction of prior malicious killing while in a federal penitentiary and the other aggravating factors. A decision of counsel relating to a choice of trial or appellate strategy, even if it were proven improvident, could not form the basis for an ineffective assistance of counsel claim.

Jones, 1995 WL 75427, at *2.

Petitioner argues that this conclusion was in error, citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), for the proposition that the capital sentencer may "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence of less than death." *Id.* Petitioner's reliance upon *Lockett* is misplaced as it involved the presentation of evidence of mitigating circumstances that was deemed not to fit within Ohio's narrow death penalty statute. *See id.* at 594-95. In the instance case, Petitioner did not "proffer" any evidence that the jury was precluded from considering.

Petitioner also relies upon *Glenn v. Tate*, 71 F.3d 1204, 1211 (6th Cir. 1995), for the proposition that "[o]ur sister circuits have had no difficulty in finding prejudice in sentencing proceedings where counsel failed to present pertinent evidence of mental history and mental capacity." *Id.*

Petitioner did not suffer prejudice sufficient to create a reasonable probability that the sentencing jury would have concluded that the balance of aggravating and mitigating factors did not warrant death. We reach this conclusion even considering the evidence presented at the evidentiary hearing below. When a district court in a habeas case orders an evidentiary hearing to settle disputed issues of material fact pursuant to its inherent authority to do so, that evidence could be offered for a variety of purposes, though the most common presumably would be to rebut the presumption of correctness

accorded to state court findings of fact. *See Groseclose v. Bell*, 130 F.3d 1161, 1163-64 (6th Cir. 1997) (stating that "federal courts must defer to state court factual findings, according a presumption of correctness that the petitioner may rebut only with clear and convincing evidence."). However, in the instant case, the additional evidence and factual findings made by the district court do not contradict the factual findings made by the post-conviction trial court. *Compare Abdur'Rahman*, 999 F.Supp. at 1093, *with id.* at 1094-1102. Instead, the additional evidence seems to merely supplement the factual findings made by the post-conviction trial court. *See Pollinzi v. Estelle*, 628 F.2d 417, 418 (5th Cir. 1980) (allowing evidence obtained at an evidentiary hearing to supplement the trial transcript and record).

Even considering the supplemental evidence heard by the district court and outlined in its opinion, Petitioner did not suffer prejudice at the sentencing phase due to his trial counsel's deficient performance. While it is true that much of the supplemental evidence contains mitigating evidence that a sentencer might find to be compelling, the same evidence likewise has aspects that would be compelling evidence of aggravating circumstances. In particular, the supplemental evidence contained a description of Petitioner's motive for killing a fellow prison inmate and a history of violent character traits. Therefore, we agree with the post-conviction trial court and the Tennessee Court of Criminal Appeals that because the mitigating evidence that could have been introduced also contained harmful information, Petitioner did not suffer prejudice sufficient to create a reasonable probability that the sentencing jury would have concluded that the balance of aggravating and mitigating factors did not warrant death. Thus, the decision of the district court that Petitioner was prejudiced at the sentencing stage due to his counsel's deficient performance is reversed.

4. Heinous, Atrocious, or Cruel Instruction

On cross-appeal, Petitioner argues that the "heinous, atrocious, or cruel" aggravating circumstance instruction that was given to the sentencing jury was unconstitutionally vague and overbroad, relying upon *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998), and *Houston v. Dutton*, 50 F.3d 381 (6th Cir. 1995). The district court concluded that even if the instruction was vague, any error caused thereby was cured by the Tennessee Supreme Court's application of a constitutional narrowing construction to the aggravating circumstance. The State argues that if the instruction was unconstitutionally vague, any error was harmless due to the jury's finding of other aggravating circumstances.

In *Maynard v. Cartwright*, 486 U.S. 356 (1988), the Court addressed the vagueness of a similar instruction and set forth the following standard to employ:

> Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis. Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).
>
> *Furman* held that Georgia's then-standardless capital punishment statute was being applied in an arbitrary and capricious manner; there was no principled means provided to distinguish those that received the penalty from those that did not. Since *Furman*, our cases have insisted that the channeling

and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.

Id. at 361-62 (citations partially omitted).

The death penalty instruction in the instant case stated:

> No death penalty shall be imposed unless you unanimously find that the State during the trial, and/or during the sentencing hearing, has proven beyond a reasonable doubt one or more of the following specific statutory aggravating circumstances:
>
> * * * * * *
>
> (2) the murder was especially heinous, atrocious or cruel, in that it involved torture or depravity of mind;
>
> * * * * * *
>
> In determining whether or not the State has proved aggravating circumstance number two above, you are governed by the following definitions. You are instructed that the word heinous means grossly wicked, or reprehensible, abominable, odious, vile. Atrocious means extremely evil or cruel, monstrous exceptionally bad, abominable. Cruel means disposed to inflict pain or suffering, causing suffering, painful--causing suffering--excuse me--painful. Torture means the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious. Depravity means moral corruption, wicked, or preverse (sic) act.

Abdur'Rahman, 990 F.Supp. at 987.

In *Maynard*, the Court held that an instruction including as an aggravating factor that the murder was "especially heinous, atrocious, or cruel" was unconstitutionally vague, though the Court left open the possibility that certain limiting constructions of that instruction would be constitutionally acceptable. *Id.* at 364-65. Additionally, it noted that "some kind of torture or serious physical abuse" limiting instruction

may pass constitutional muster. *See id.* Following *Maynard*, this court held unconstitutionally vague an instruction stating a specified statutory aggravating circumstance as: "[t]he murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." *Houston*, 50 F.3d at 387.

We decline to pass on the constitutionality of the instruction in this case because any error therein was harmless. "[W]henever an aggravating factor has been invalidated in a weighing state,[5] the sentence must be reweighed or analyzed for harmless error if the sentence is to be affirmed." *Coe*, 161 F.3d at 334. The *Coe* court went on to state that:

> In a weighing state . . . when a court invalidates one of the aggravators, it has removed a mass from one side of the scale. There is no way to know if the jury's analysis--how the aggravating and mitigating circumstances balanced--would have reached the same result even without the invalid factor.
>
> . . .
>
> [I]t is only when the "death sentence has been infected by a constitutionally . . . invalid aggravating factor" that state reweighing is required to preserve the verdict. By definition, though, an error that is harmless does not "infect" the sentence and does not require reweighing by the state.
>
> . . .
>
> We turn, therefore, to analyze this error for harmfulness. The question we must ask is whether the

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[5] "Tennessee is a 'weighing' state--that is, the jury determines whether any aggravating circumstances have been established beyond a reasonable doubt by the State and then balances this against any mitigating circumstances found by the individual jurors. If the jury unanimously finds that the aggravators outweigh the mitigators, death must be imposed." *Houston v. Dutton*, 50 F.3d 381, 387 (6th Cir. 1995).

> error "had substantial and injurious effect or influence in determining the jury's verdict."

Id. at 334-35. In *Coe*, the error was deemed harmless because the jury made the narrow finding that "the murder was especially heinous, atrocious, or cruel and involved torture," when it had been charged to find that the murder was "especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." *Id.* at 335.

Unfortunately, the jury's verdict form in the instant case was not preserved. However, the Supreme Court of Tennessee made the factual finding that the jury had found the three aggravating circumstances as set forth above in the Background section. *See State v. Jones*, 789 S.W.2d 545, 550 (Tenn. 1990). These factual findings are accorded the presumption of correctness under 28 U.S.C. § 2254(d). *See Sumner*, 449 U.S. at 546 (stating that § 2254(d) "makes no distinction between the factual determinations of a state trial court and those of a state appellate court."). Additionally, Petitioner has neither offered any argument as to why this presumption should not apply, nor any evidence that the jury did not find the three aggravating circumstances.

As the State correctly points out, there was ample evidence to support the aggravating circumstances that Petitioner had been previously convicted of one or more felonies involving the use or threat of violence to the person and that the instant murder was committed while the Petitioner was engaged in committing, or attempting to commit, any first degree murder or robbery. *See State v. Jones*, 789 S.W.2d at 550 (stating that "[t]here is no doubt that the evidence in this case was sufficient to support each of the aggravating circumstances found by the jury."). As quoted above, the *Coe* court found that removing one aggravating circumstance from the sentencing calculus in a weighing state normally would require a re-weighing of the aggravating and mitigating factors. *See Coe*, 161 F.3d at 334. However, in the instant case, as the district court found,

"[t]his is a case of no mitigating evidence--none--being offered to the jury despite its availability and abundance." *Abdur'Rahman*, 999 F.Supp. at 1101. Thus, even if the heinous, atrocious, or cruel aggravator is removed form the calculus, there is no mitigating evidence to weigh against the remaining prior felony conviction and felony murder aggravators. Therefore the error was harmless in that it did not have a substantial and injurious effect or influence in determining the jury's verdict.[6]

5. Petitioner's Unanimity Objection to the Sentencing Instructions

Petitioner argues that the sentencing instructions improperly led the jurors to believe that they had to unanimously find any mitigating circumstances and did not specifically instruct them otherwise. Although no direct instruction was given requiring that the jurors find the existence of each mitigating factor unanimously, Petitioner argues that the jury was repeatedly informed that their decisions had to be unanimous, but were not instructed that they did not have to be unanimous as to mitigating circumstances. The district court held that "there is not a reasonable likelihood that the jury interpreted the instructions to require unanimity as to mitigating circumstances. . . . [t]his Court is not persuaded that silence as to finding a mitigating circumstance would likely lead the jury to believe that unanimity was required in this case." *Abdur'Rahman*, 990 F.Supp. at 994. This holding was correct.

In *Mills v. Maryland*, 486 U.S. 367 (1988), the Court held that sentencing instructions that create a substantial

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[6] This conclusion is not affected by our holding that the district court properly considered the evidence it obtained during the evidentiary hearing because although that evidence contained mitigating circumstances that could have been offered at the sentencing stage, Petitioner does not argue that a re-weighing is necessary on this basis. Thus, in terms of possible re-weighing, we look only to the evidence presented at the sentencing stage.

likelihood that reasonable jurors might think that they are precluded from considering any mitigating evidence in the absence of unanimity are constitutionally invalid. *See id.* at 384. The standard for reviewing such a challenge to the jury instructions "is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990).

In the instant case, the substantive portions of the trial court's instructions were:

> Our statutory law provides that the jury shall fix punishment after a separate sentencing hearing, to determine whether the defendant shall be sentenced to death or life imprisonment. Your verdict must be unanimous as to either form of punishment.
>
> * * * * * *
>
> No death penalty shall be imposed unless you unanimously find that the State during the trial, and/or during the sentencing hearing, has proven beyond a reasonable doubt one or more of the following specific statutory aggravating circumstances:
>
> * * * * * *
>
> In arriving at the punishment, the jury shall consider, as heretofore indicated any mitigating circumstances which shall include, but not be limited to the following:
>
> * * * * * *
>
> If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the State beyond a reasonable doubt, and that the aggravating circumstance or circumstances outweigh any mitigating circumstances, the sentence shall be death. If the death penalty is the decision of the jury the members of the jury shall then complete the attached form entitled, quote:

> Punishment of Death
>
> End quote.
>
> The jury must include and reduce to writing the specific statutory aggravating circumstance or circumstances so found. Further, the jury must include in its finding that the statutory aggravating circumstance or circumstances so found outweigh any mitigating circumstances. Upon such unanimous finding, each member of the jury shall affix his or her signature to the said written finding, and then return said written verdict to the Court.
>
> If the jury unanimously determines that no statutory aggravating circumstance or circumstances have been proven by the State beyond a reasonable doubt; or if the jury unanimously determines that the statutory aggravating circumstance or circumstances have been proved by the State beyond a reasonable doubt, but that the said circumstance or circumstances do not outweigh any mitigating circumstances, the punishment shall be life imprisonment.

Abdur'Rahman, 990 F.Supp. at 993. Additionally, at the end of the instructions the trial court stated that "[t]he verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous." *Id.* at 993-94.

Coe is dispositive of this issue. In *Coe*, the jury was similarly told that to impose the death sentence its verdict must be unanimous. *See Coe*, 161 F.3d at 337. This court held:

> We find that the instructions challenged by Coe do not violate Mills. Their language requires unanimity as to the results of the weighing, but this is a far different matter than requiring unanimity as to the presence of a mitigating factor. Nothing in this language could reasonably be taken to require unanimity as to the

> presence of a mitigating factor. The instructions say clearly and correctly that in order to obtain a unanimous verdict, each juror must conclude that the mitigators do not outweigh the aggravators.

Coe, 161 F.3d at 338. The same can be said of the instructions in the instant case. No statement therein can be said to require unanimity as to the presence of a mitigating factor. Indeed, Petitioner merely argues that the proximity of the terms "unanimous" and "mitigating circumstances" could have led the jury to misinterpret their obligation. This is not enough to create a reasonable likelihood that the jury applied the challenged instruction in a way that prevented the consideration of constitutionally relevant evidence.[7]

B. Petitioner's Cross-Appeal Challenging the Denial of his Petition for the Writ of Habeas Corpus as to his Conviction

On cross-appeal, Petitioner argues that the district court's conclusion that he suffered no prejudice from his trial counsel's deficient performance at the guilt stage was erroneous. First, Petitioner argues that due to his trial counsel's conflict of interest and wholly inadequate representation,[8] prejudice can be presumed and therefore need not be shown. Second, Petitioner argues that he did in fact suffer prejudice by trial counsel's delay in preparing for his trial, by the failure to present forensic evidence, and by the failure to present evidence concerning Petitioner's mental history. In response, the State argues that there was no actual

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[7] Additionally, as the district court found, there was no mitigating evidence presented that the jury would have been precluded from properly considering even if the instructions were misinterpreted to require unanimity as to the existence of a mitigating factor.

[8] Petitioner argues that he is entitled to habeas relief on his conviction due to his trial counsel's inadequate performance without having to show prejudice under *United States v. Cronic*, 466 U.S. 648 (1984), and *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997). However, Petitioner points to no facts supporting a claim of wholly inadequate representation.

conflict of interest and that Petitioner suffered no prejudice because he cannot show a reasonable probability that the result of the proceeding would have been different in the absence of trial counsel's deficient performance.

The prejudice prong of *Strickland* relating to ineffectiveness of counsel at the guilt phase asks "the question . . . whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. As stated above, the prejudice prong of *Strickland* is a mixed question of law and fact subject to de novo review. *See Id.* at 698. Petitioner's claims must be evaluated keeping in mind the compelling incriminating testimony of both Miller and Norman. Additionally, Petitioner confessed to the crime at the sentencing stage. *See Abdur'Rahman*, 990 F.Supp at 1086.

1. Conflict of Interest

Petitioner argues that he need not show any prejudice as defined by *Strickland* because under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain [habeas] relief." *Id.* at 349-50. Petitioner argues that the third-party fee arrangement created a conflict of interest for his trial counsel because Boyd, the source of payment, was involved in the crime due to having allegedly supplied the shotgun used by Petitioner. However, the next sentence in *Cuyler* is dispositive of Petitioner's claim. *Cuyler* strictly requires that "until a defendant shows that his counsel actively represented conflicting interests, he has not established a claim of ineffective assistance. . . . [T]he possibility of conflict is insufficient to impugn a conviction." *Id.* at 350.

Petitioner fails to show that his trial counsel was actively representing conflicting interests. At most, Petitioner's trial counsel delayed the preparation of his case for too long in anticipation of receiving the balance of his retainer fee.

Though Petitioner argues that he was adversely affected by the conflict of interest, he does not allege that his trial counsel was actively representing conflicting interests. Additionally, Petitioner could not make such a showing because as the district court noted, "even if Mr. Boyd's interests were adverse to Petitioner, Mr. Barrett certainly did not protect the interests of SEGM or Mr. Boyd during the trial and sentencing." *Abdur'Rahman*, 999 F.Supp. at 1091. The district court noted that Barrett elicited testimony about the SEGM from Beard on cross-examination, mentioned the Petitioner's connection with the group during his closing argument, and issued subpoenas for Boyd and Beard to appear at the trial. Thus, it cannot be said that Barrett was actively representing conflicting interests.

Petitioner's reliance upon *Wood v. Georgia*, 450 U.S. 261 (1981), is misplaced. *Wood* involved an Equal Protection challenge to the imprisonment of three probationers because of their inability to make installment payments on fines. The Court did not resolve this issue because it remanded for a determination of whether a conflict of interest existed within a third-party payor arrangement. The probationers were three employees of an adult movie theater and bookstore who had been convicted of distributing obscene materials. As pointed out by Petitioner, the Court noted that "'[a] conflict of interest inheres in every such situation [a criminal defendant being represented by a lawyer hired and paid by a third party] . . . It is inherently wrong to represent both the employer and the employee . . . it is also inherently wrong for an attorney who represents only the employee to accept a promise to pay from one whose criminal liability may turn on the employee's testimony." *Id.* at 271 n.15.

Unlike the instant case, in *Wood* the attorney was representing both the employer and the employees: "[s]ince it was this decision [not to pay the fines] by the employer that placed petitioners in their present predicament, and since their counsel has acted as the agent of the employer and has been paid by the employer, the risk of conflict of interest in this

situation is evident." *Id.* at 267. Additionally, the statement from *Wood* upon which Petitioner so heavily relies was contained in a footnote to that opinion and was not the basis of the Court's decision to remand for an evidentiary hearing to determine whether a conflict of interest existed. Instead, the Court stated that "[o]n the record before us, we cannot be sure whether counsel was influenced in his basic strategic decisions by the interests of the employer who hired him." *Id.* at 272. In the instant appeal, the record below does not compel the same conclusion. Given the district court's conclusion that Barrett did not protect the interests of Boyd or the SEGM, Petitioner cannot show that Barrett was actively representing conflicting interests and that he is therefore not entitled to a presumption of prejudice at the guilt stage.

2. Prejudice

Petitioner argues that the district court erred in concluding that he did not suffer any prejudice by his trial counsel's deficient performance of delaying his preparation for trial, by the failure to present forensic evidence, and by the failure to present evidence concerning Petitioner's mental history.

First, Petitioner argues that Barrett's decision not to work on the case until he received the balance of the retainer prejudiced him by the lack of any meaningful work being performed and by depriving him of representation during his psychological evaluation. However, Petitioner points to no specific evidence that would raise a reasonable probability that the factfinder would have had a reasonable doubt respecting guilt in the absence of this delay.

Second, Petitioner argues that he was prejudiced by his trial counsel's failure to investigate and present a lab report showing that no blood was found on the clothes he was allegedly wearing during the offense. The district court correctly held that such evidence would not have created a reasonable doubt about guilt because although there was testimony that Petitioner was wearing a long dark coat on the

night of the offense, there was no evidence that at the time of the homicide Petitioner was wearing the clothes seized later from his apartment. *See Abdur'Rahman*, 999 F.Supp. at 1096.

Finally, Petitioner argues that trial counsel's failure to investigate his mental history, especially his diagnoses of Post-Traumatic Stress Disorder and Borderline Personality Disorder, prejudiced him at the guilt stage of his trial. The district court held that this was not prejudicial because there was no evidence that Petitioner could have produced an expert to testify that he was insane at the time of the stabbings, or even if one did so testify that testimony would have been effectively countered by evidence from the Middle Tennessee Mental Health Institute from an examination authorized prior to trial that there was no basis for Petitioner to invoke an insanity defense. A review of this MTMHI document shows that it would be compelling evidence against any insanity defense. Thus, Petitioner cannot show that there is a reasonable probability that the factfinder would have had a reasonable doubt respecting guilt if his trial counsel had investigated and presented evidence of his mental history.

The district court did not err in concluding that Petitioner suffered no prejudice at the guilt stage due to his counsel's deficient performance.

III. CONCLUSION

The district court's finding of prejudice at the sentencing stage is REVERSED and the judgment granting the petition for a writ of habeas corpus as to Petitioner's death sentence is VACATED. The district court's judgment denying the petition for a writ of habeas corpus as to Petitioner's conviction is AFFIRMED.

CONCURRENCE

ALICE M. BATCHELDER, Circuit Judge, concurring. The habeas court in this case believed that it had essentially unlimited discretion to conduct an evidentiary hearing on the petitioner's ineffective assistance of counsel claim. Such discretion is, however, an artifact of a bygone era. As this court recognized in *Mitchell v. Rees*, the modern Supreme Court has substantially pared back the ability of federal courts to retry cases already tried in the state courts. I would therefore hold that the district court in this case improvidently granted the petitioner an evidentiary hearing. I concur in all other parts of Judge Siler's opinion.

I

In 1963, the Supreme Court invested federal habeas courts with broad discretion in most aspects of collateral review of state criminal judgments. Contending that the common law conceived of the Great Writ as a remedy available for any kind of governmental detention contrary to fundamental law, the Court in *Fay v. Noia* declared that "federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in . . . state court proceedings." *Fay*, 372 U.S. 391, 426 (1963). This broad conception led the Court to hold that even a petitioner who had procedurally defaulted his claims in state court could obtain habeas relief, subject to the district court's "discretion" to deny relief when the orderly procedure of the state courts had been deliberately bypassed. *Id.* at 434, 438. In parallel fashion, the Court empowered federal habeas courts to conduct evidentiary hearings even when a petitioner had failed to develop the facts in state court proceedings. "In every case," the Supreme Court wrote in *Townsend v. Sain*, the district judge "has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim." *Townsend*, 372 U.S. 293, 318 (1963). *Townsend* limited the discretion of habeas courts in this regard only by requiring that evidentiary

hearings be held under six circumstances that would call into question the integrity of state court factfinding. *Id.* at 313.

The generation following *Fay* and *Townsend* has witnessed a sea-change in the law of habeas corpus. This change has been spurred by an increased attentiveness to considerations of comity and the values of "our federal system." *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). The idealistic predictions of *Fay* and *Townsend* that federal district judges, mindful of their delicate role in the maintenance of proper federal-state relations, would not employ their discretion to subvert the integrity of state criminal justice, had been proven wrong. *Townsend*, 372 U.S. at 318; *see also Fay*, 372 U.S. at 433 (suggesting that the plenary power of inquiry on federal habeas corpus would not create incentives for defendants to withhold claims in state proceedings). The law reviews and the popular press echoed with calls for the unelected federal judiciary to desist from frustrating the outcomes of democratic process, particularly in capital cases. *See generally* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U.L. Rev 333 (1998) (tracing the history of the countermajoritarian difficulty); *see also* Thomas Goldsmith, *Activists Want Nixon Impeached: Group Takes Message to Centennial Park*, The Tennessean, Mar. 26, 2000, at 1B (noting current calls for the impeachment of a federal district court judge on the ground that his personal bias against the death penalty makes him unfit to hear cases in which it is a factor). *Fay* was overruled. *See Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977).

Recognizing that in a federal system, the States should have the first opportunity to address and correct violations of state prisoners' federal rights, and that *Fay* had undervalued the important interests served by state procedural rules, the Supreme Court replaced *Fay*'s "deliberate bypass" standard with a cause-and-prejudice inquiry. *Coleman*, 501 U.S. at 731, 750. "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent

and adequate state procedural rule, federal habeas review of the claims is *barred* unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Id.* at 750 (emphasis supplied). In view of the significant harm suffered by States when federal courts failed to respect state procedural rules, federal court "discretion" to consider a habeas petitioner's federal claims was inappropriate when the petitioner had deprived the state courts of an opportunity to address those claims in the first instance.

Townsend's holding with respect to evidentiary hearings, too, was overruled. Just as a district court had no discretion to consider federal claims that a habeas petitioner had not submitted to the state courts, neither could it have discretion to allow a petitioner to develop facts that had not been fairly presented to the state courts. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 7-8 (1992) (stating that it is "irrational to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim"). Thus, in *Keeney v. Tamayo-Reyes*, the Supreme Court applied the cause-and-prejudice standard to determine whether a state prisoner who had failed to develop material facts in state court was entitled to an evidentiary hearing on habeas corpus. *Id.* at 11.

Keeney was a case in which a petitioner sought a federal evidentiary hearing but did not receive one. *See Id.* at 4. Taking his cue from this fact, Judge Siler interprets *Keeney* to mean that a showing of cause and prejudice *requires* a habeas court to conduct an evidentiary hearing, but that even in the absence of such a showing, the court retains discretion to hold a hearing. *See ante* at __. In my view, neither the language nor the reasoning of *Keeney* will support this interpretation. In addition, the Supreme Court's recent pronouncements in *Williams v. Taylor*, 120 S. Ct. 1479 (2000), strongly

corroborate a reading of *Keeney* that limits the authority of habeas courts to order evidentiary hearings.

The *Keeney* Court granted certiorari to decide "the correct standard for excusing a habeas petitioner's failure to develop a material fact in state-court proceedings." *Keeney*, 504 U.S. at 5. Ultimately, the Court determined that "the 'cause-and-prejudice' standard embodies the correct accommodation between the competing concerns implicated in a federal court's habeas power." *Id.* at 7. As a purely textual matter, nothing in the Court's framing of the question, or in its resolution of that question, suggests that the Court was restricting its holding to those circumstances in which a habeas petitioner is "entitled" to an evidentiary hearing.

More importantly, the logic that the Court followed to arrive at the cause-and-prejudice standard will not admit of such a construction. The Court based its holding on a quintet of values embedded in our federal system: comity, finality, judicial economy, channeling of claims to the appropriate forum, and uniformity in the law of habeas corpus. *Id.* at 8-10. It is difficult to understand how any of these values would be served by a system that entitled state prisoners to evidentiary hearings only upon a showing of cause and prejudice, but nevertheless invested the habeas courts with bottomless discretion to order hearings where they are not required. Such a system still would deny the States the opportunity to correct their own constitutional errors, would multiply the opportunities to relitigate convictions, and would consume scarce judicial resources.

Of particular concern is the disruption to the values of proper forum allocation and uniformity that would attend survival of the *Townsend* doctrine. The Supreme Court likened the former value to the requirement of exhaustion, noting: "Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits." *Id.* at 10. A doctrine that allows a

habeas court to conduct an evidentiary hearing where the petitioner has, without cause, failed to develop facts in state court re-engineers this two-way street into a blind alley. Even though the state court is the appropriate forum for resolution of factual questions in the first instance, *Townsend* creates "incentives for the deferral of factfinding to later federal court proceedings"--which can only "degrade the accuracy and efficiency of judicial proceedings." *Id.* at 9.

Similarly, the *Keeney* Court rested its holding on a symmetry between the jurisprudence of procedural default and that governing factfinding in the habeas courts. "There is no good reason to maintain in one area of habeas law a standard that has been rejected in the area in which it was principally enunciated," wrote the Court. "And little can be said for holding a habeas petitioner to one standard for failing to bring a claim in state court and excusing the petitioner under another, lower standard for failing to develop the factual basis of that claim in the same forum." *Id.* at 10. A dogged fidelity to *Townsend* disrupts this symmetry. Absent a showing of cause and prejudice, a habeas court would have no discretion to entertain a claim that had been procedurally defaulted in state court, but would have discretion to conduct an evidentiary hearing on a claim raised but insufficiently developed in state court, even where the petitioner did not show cause and prejudice for his failure to develop the factual record in the state court. Given the importance that the *Keeney* Court ascribed to uniformity in the law of habeas corpus, that cannot be a correct reading of the case.

This Court has recognized that *Keeney* implicitly withdrew the discretion that *Townsend* had granted. In *Mitchell v. Rees*,[1] we reversed a district court for ordering an

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[1]To the extent that *Mitchell* suggested that a district court is without authority to hold an evidentiary hearing without first finding that one of the factors listed in 28 U.S.C. § 2254(d) applies, I agree with Judge Siler that its statement is "overbroad". *See Keeney*, 504 U.S. at 1720 n.5 (noting that § 2254(d) "indicates no assumption that the presence or

evidentiary hearing on a habeas petitioner's *Batson* challenge without requiring the petitioner to establish either (1) cause and prejudice for his failure to adequately develop the material facts in the state court proceedings, or (2) that not holding an evidentiary hearing would result in a fundamental miscarriage of justice. *Mitchell*, 114 F.3d 571, 579 (6th Cir. 1997). "[A] district court abuses its discretion," we said, "by ordering such a hearing without first requiring the petitioner to make the requisite showing." *Id.* at 577. We have been joined in this understanding by at least one other Circuit. *See Mathis v. Zant*, 975 F.2d 1493, 1497 (11th Cir. 1992).

Our understanding is buttressed by a case decided by the Supreme Court just this Term, *Williams v. Taylor*. In *Williams*, the Court interpreted 28 U.S.C. § 2254(e)(2), a statute enacted four years after the decision in *Keeney*. Section 2254(e)(2) provides: "If the [habeas] applicant has failed to develop the factual basis of a claim in State court proceedings, the court *shall not* hold an evidentiary hearing on the claim unless the applicant" satisfies certain conditions. 28 U.S.C. § 2254(e)(2) (emphasis supplied). In deciding the level of fault connoted by the term "fail", the Court determined that the opening clause of § 2254(e)(2) is essentially a codification of the holding in *Keeney*: "Congress intended to preserve at least one aspect of *Keeney*'s holding: prisoners who are at fault for the deficiency in the state-court record must satisfy a heightened standard to obtain an evidentiary hearing." *Williams*, 120 S. Ct. at 1489. As this language suggests, the Supreme Court itself does not read *Keeney* as deciding when a petitioner is *entitled* to an evidentiary hearing; rather, the case sets forth what a petitioner must do in order to obtain one. *See also Id.* at 1488 ("We required the prisoner [in *Keeney*] to demonstrate cause and prejudice excusing the default before he *could* receive a hearing on his claim . . . ." (emphasis supplied)).

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absence of any of the statutory exception will determine whether a hearing is held").

Keeney, *Mitchell*, and *Williams* thus command that a petitioner who has not developed facts in state court must justify his failure to do so through a showing of cause and prejudice before he may present those facts to a federal habeas court.

II

In Tennessee's post-conviction courts, petitioner Abdur'Rahman claimed that his trial counsel had rendered ineffective assistance by failing to investigate his mental health and criminal histories sufficiently to paint a sympathetic picture of his abusive childhood and resulting serious mental illness at sentencing. The state court conducted an evidentiary hearing, at which it considered the testimony of one Dr. Barry Nurcombe; Abdur'Rahman's school, military, and prison records; the transcript of a previous trial; records of the Middle Tennessee Mental Health Institute; records of social services departments; the affidavit of Mark Jones, Abdur'Rahman's brother; and a great deal of other evidence. At the conclusion of the hearing, the court held that Abdur'Rahman's trial counsel had been constitutionally deficient--reasonable attorneys would have investigated the accused's mental health and criminal histories. The court concluded, however, that counsel's faulty performance did not prejudice Abdur'Rahman. The evidence introduced at the hearing, the court noted, contained extensive documentation that Abdur'Rahman had had a past of profound violence, but no serious mental illness. Deciding that this information "looks like a mine field for any trial attorney to tiptoe through," the court denied post-conviction relief.

In his petition for federal habeas relief, Abdur'Rahman renewed his contention that trial counsels' deficient performance at sentencing had resulted in prejudice. Over the State's objection, the district court conducted an evidentiary hearing on the ineffective assistance claim. Although the State confronted the district court with *Mitchell*, the court

cited an unpublished district court order for the proposition that the granting of an evidentiary hearing is discretionary. The district court proceeded to consider a significant volume of evidence, including the testimony of seven live witnesses, that was not presented to the state courts. Largely on the basis of this evidence, the district court concluded that Abdur'Rahman had been prejudiced because his trial attorneys could have shown such mitigating circumstances as childhood abuse, serious mental illness, and the defendant's good qualities.

In doing so, the district court erred. Upon authority of *Keeney* and *Mitchell*, the district court could not order an evidentiary hearing until Abdur'Rahman showed cause for his failure to develop the factual record fully in the state courts. Ordinarily we would vacate the order partially granting the writ of habeas corpus and the order for the evidentiary hearing, *Mitchell*, 114 F.3d at 579, and remand the matter to the district court to afford Abdur'Rahman the opportunity to bring forward evidence establishing cause and prejudice, *Kenney v. Tamayo-Reyes*, 504 U.S. at 11. In this case, however, such a disposition is unnecessary; the evidence that Abdur'Rahman adduced at the federal evidentiary hearing is plainly insufficient to undermine confidence in the jury's sentence. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). As Judge Siler points out, the additional evidence presented to the habeas court merely supplemented the factual findings made by the post-conviction trial court. What the state court said in 1995 holds true today: "It is unrealistic to expect the jury to change the result because of testimony about the petitioner's troubled background and mental illness in the face of a prior murder conviction which is added to two additional aggravating circumstances including the heinousness of the killing." I therefore concur that the order granting the writ as to Abdur'Rahman's death sentence should be reversed.

CONCURRING IN PART, DISSENTING IN PART

R. GUY COLE, JR., Circuit Judge, concurring in part, dissenting in part. Because I would affirm the district court's determination that Abdur'Rahman's counsel was constitutionally ineffective at sentencing and that the writ should be granted as to this issue, I respectfully dissent from that portion of Judge Siler's opinion.

As an initial matter, I agree with Judge Siler that the district court properly ordered an evidentiary hearing, under its discretion to do so, and properly considered the evidence presented at this hearing. I also note that the concurrence's invocation of the bugaboo of overreaching federal courts does not reflect the reality of federal habeas review. *See* 1 FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS 482 (1990) (reporting that, in 1987 and 1988, only 1.1% of habeas corpus petitioners received a full hearing at the district court).

Abdur'Rahman's counsel was constitutionally ineffective at sentencing due to counsel's utter failure to investigate or present available mitigating evidence. In order to prove ineffective assistance of counsel, Abdur'Rahman must fulfill the familiar two-prong requirement of *Strickland v. Washington*, 466 U.S. 668 (1984).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. As noted by the majority, we review this mixed question of law and fact de novo. *See Id.* at 698; *McQueen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir. 1996).

The district court and both Tennessee post-conviction courts that examined this case determined that Abdur'Rahman's counsel's performance was deficient. The state does not challenge this determination. I survey counsel's deficiencies here because I believe that they help illuminate why Abdur'Rahman's sentence of death "resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687.

Counsel's performance, as it related to preparation for and presentation at the sentencing hearing, was constitutionally inadequate. "[W]hen a client faces the prospect of being put to death unless counsel obtains and presents something in mitigation, minimal standards require some investigation." *Mapes v. Coyle*, 171 F.3d 408, 426 (6th Cir. 1999); *see Baxter v. Thomas*, 45 F.3d 1501, 1512 (11th Cir. 1995) (stating that defense counsel was obligated to investigate mitigating mental health evidence for sentencing). Counsel failed to ask the trial court to declare Abdur'Rahman[1] indigent or to ask the court for funds for investigation or experts; failed to hire an independent mental health expert; failed to investigate the nature of Abdur'Rahman's prior convictions; failed to contact and present available witness testimony from Abdur'Rahman's family at sentencing; failed to investigate Abdur'Rahman's numerous mental health records or educational, military, and prison records; and failed to inquire about Tennessee records regarding Abdur'Rahman's mental health or background or introduce evidence from these at his sentencing hearing. In sum, counsel completely failed to investigate and present Abdur'Rahman's mental health history, his institutional history, or other mitigating evidence.

The majority suggests that, armed with this evidence, defense counsel could have made a legitimate tactical

[1]I use Abdur'Rahman's present name throughout when referring to him, even in the context of events that occurred or documents created when the petitioner went by the name of Jones.

decision not to present the evidence, which is now in the record but was not presented to the jury, and that we should defer to this decision. Unfortunately, defense counsel's "tactical decision" in this case was to not prepare for the capital sentencing hearing of their client. "[O]ur case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991).

Further, and more importantly, I disagree with the majority's finding that Abdur'Rahman was not prejudiced by counsel's failure. To demonstrate prejudice, Abdur'Rahman "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. He need not show that counsel's performance more likely than not affected the outcome of the case. *See Id.* at 693-94. Instead, "[w]hen a defendant challenges a death sentence . . ., the question is whether there is a reasonable probability that, absent the errors, the sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 696.

Counsel's failure to investigate or properly prepare for sentencing resulted in the presentation of essentially no mitigating evidence to the jury at the sentencing phase. Despite counsel's assertion in his opening statement that he would put on other witnesses, Abdur'Rahman and his wife were the sole witnesses at sentencing and their testimony related to the circumstances of the offense for which he was found guilty. It did not address Abdur'Rahman's history of abuse, his mental health treatment, or other relevant aspects of his life. This is so despite the fact that the jury should "'not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the

circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Penry v. Lynaugh*, 492 U.S. 302, 317 (1989) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original)).

Although the jury found three aggravating factors at sentencing, it had nothing to weigh this information against; it is unsurprising that comparing those three factors with the dearth of mitigating evidence that the jury chose to impose a death sentence on Abdur'Rahman. However, "[t]he Eighth Amendment requires a jury to consider the circumstances of the crime and the defendant's background and character during the sentencing phase of a capital trial." *Austin v. Bell*, 126 F.3d 843, 848 (6th Cir. 1997). The jury's failure to consider mitigating evidence "risks erroneous imposition of the death sentence." *McKoy v. North Carolina*, 494 U.S. 433, 442 (1990) (quoting *Eddings v. Oklahoma*, 455 U.S. at 117, n.* (O'Connor, J., concurring)).

Unbeknownst to the jury determining Abdur'Rahman's fate, mitigating evidence existed and was available for presentation at his sentencing hearing. If counsel had performed adequately, the jury could have learned that that Abdur' Rahman has a history of traumatic abuse as a child, that he had a long history of mental health problems and treatments, and, finally, that Abdur'Rahman had previously been a productive member of society.

The abuse suffered as a child by Abdur'Rahman, mostly at the hands of his father, a military policeman, was inhumane and shocking.[2] Dr. Raymond Winbush, who testified before

[2] As the district court stated:

> During the hearing in this Court, Nancy Lancaster, Petitioner's half-sister, testified about the abuse and difficulties Petitioner experienced during his childhood. Although some of the information Ms. Lancaster related was based on statements made by other family members, the Court was very impressed with Ms. Lancaster's credibility and demeanor.

the district court, stated that Abdur'Rahman's "is singularly the worst case of abuse I have come across in 25 years being an academic psychologist . . . I can't even in my memory remember anything that remotely comes close to some of the things I read."

This abuse was attested to by the petitioner, the petitioner's half-sister, who was not contacted by counsel but was available to testify, and the petitioner's brother, Mark Jones, who likewise was not contacted by counsel but stated in an affidavit that he would have been willing to testify at trial.[3] This abuse, while not a justification for petitioner's criminal conduct, is relevant, mitigating evidence that should have been presented to the jury.

Abdur'Rahman had a persistent history of psychiatric disorders and mental health problems. A "defendant[] who commit[s] criminal acts that are attributable to a disadvantaged background, or to emotional and mental

Ms. Lancaster testified that she and the Petitioner share a common mother, who abandoned Ms. Lancaster and her two brothers when she was an infant. Petitioner's mother put her three children in a taxi, drove them to the woods, and left them. Petitioner's mother later married Petitioner's father, James Jones, Sr. Three more children were born of that marriage -- James (Petitioner), Mark, and Sylvia.

Petitioner's statements to mental health providers [over the course of his life] provide a vivid description of the abuse Petitioner suffered at the hands of his father. Petitioner received regular beatings with a leather strap from his father. Petitioner's father made him take off his clothes, placed him hog-tied in a locked closet, and tethered him to a hook with a piece of leather tied around the head of his penis. Petitioner's father struck Petitioner's penis with a baseball bat. To punish him for smoking, Petitioner's father required him to eat a pack of cigarettes, and when he vomited, was made to eat the vomit. None of this extraordinary abuse, which constitutes relevant mitigating evidence, was heard by the jury.

Abdur'Rahman v. Bell, 999 F. Supp. 1073, 1097-98 (M.D. Tenn. 1998) (footnote and citations to record omitted).

[3] Petitioner's brother subsequently committed suicide.

problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). The mental health of the defendant has consistently been determined to be relevant, probative information to which the jury is entitled when making a life or death decision. *See, e.g., Carter v. Bell*, 218 F.3d 581 (6th Cir. 2000) (finding that the petitioner was prejudiced by counsel's failure to investigate and present mitigating evidence at sentencing); *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir. 1995). The jury, however, heard nothing at sentencing regarding Abdur'Rahman's mental health history.

In the record before us, we have the testimony of Dr. Samuel Craddock, who was part of the team that diagnosed Abdur'Rahman for the state of Tennessee for purposes of competency to stand trial and a potential insanity defense without knowledge of his history of mental illness. Craddock testified that Thorazine and Prolixin, the medications prescribed for Abdur'Rahman in prison, were powerful anti-psychotic medications which raised a question of whether he was mentally ill, and that the symptoms exhibited by Abdur'Rahman were like those of someone with a borderline personality disorder. Dr. Diana McCoy testified that she diagnosed Abdur'Rahman with post-tramatic stress disorder and a possible borderline personality disorder. Dr. Robert Sadoff offered a similar diagnosis as McCoy.

Included in the records before this court are a department of social services report from the state of Washington stating that Abdur'Rahman had a "paranoid personality" and "personality pattern disorder;" Philadelphia school records which include a request for psychiatric services; and prison records, including psychiatric examinations, some which state that Abdur'Rahman does not have a mental illness or psychosis, but does have a history of documented suicide attempts, and some which indicate that Abdur'Rahman was diagnosed with other disorders, including a severe psychopathic personality and a "psychotic depressive reaction

and antisocial personality." Abdur'Rahman's prison records also indicate that Abdur'Rahman was frequently and heavily medicated during at least some of his time in prison and that he beat his head against the wall while in prison. Records from the New Jersey Department of Human Services document his 1967 stay while a youth at the Trenton Psychiatric Hospital, where he was diagnosed with a sociopathic personality disturbance and antisocial reaction with depression, and records from the Davidson County Sheriff's Department show that Abdur'Rahman beat his head against a wall after his arrest there. Further, the record indicates that others in Abdur'Rahman's family had mental health problems. Many of these records were available to defense counsel through the MTMHI report, prepared for the purpose of determining Abdur'Rahman's competence to stand trial;[4] however, counsel failed to investigate or present any of this mitigating information to the jury. Nor did counsel present to the jury a mental health expert who could have testified regarding Abdur'Rahman's mental health problems.

Further, testimony from the trial of Abdur'Rahman's conviction for second-degree murder for the killing of a fellow inmate - a conviction that supported one of the aggravating circumstances - indicated, in the opinion of one expert, that Abdur'Rahman had a borderline personality disorder and schizoid personality. This evidence could have been mitigating with respect to the petitioner's mental health, as well as with respect to the prior murder.

Abdur'Rahman's wife could have her personal observations about his mental health, including the fact that her husband had conversations with people who did not exist, banged his head against the wall, and believed that the couple would give birth to the next Messiah. She also stated that she

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[4]The fact that Abdur'Rahman was found competent to stand trial does not, of course, alter the fact that his mental health problems should be considered by the jury at sentencing. *See Blano v. Singletary*, 943 F.2d 1477, 1503 (11th Cir. 1991).

told defense counsel that a psychiatrist should examine her husband.

Despite his childhood abuse and extensive mental health history, Abdur'Rahman was able to comport his conduct to societal norms and to engage in productive activities. His former fiancé, about whom he informed defense counsel, but whom counsel failed to contact, later testified that, when she knew him in 1983, Abdur'Rahman held a steady job, attended college, and volunteered with a Quaker youth group at a large housing project. She stated that the petitioner was a caring and gentle person who sincerely held Christian beliefs.

While acknowledging that some of this evidence would have been mitigating, the majority adopts the rationale of the state court of appeals that the evidence that defense counsel failed to investigate or present also contained instances of violent conduct and anti-social actions by Abdur'Rahman. This treatment of the evidence by the majority contradicts the emphasis by the courts that evidence considered mitigating by the person facing a death sentence should be allowed to the greatest extent possible to insure a full and fair determination by the jury. *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). Further, the majority overlooks that the jury already had much of this evidence of violent or prior criminal conduct before it and that the presentation of available, relevant evidence at sentencing would not have subjected Abdur' Rahman to additional statutory aggravating factors. The mitigating elements of this evidence would have served, instead, to present the jury with an accurate and complete picture of the person they were sentencing - the very purpose of a capital sentencing hearing. In addition, the majority ignores the mitigating potential of nearly all of the available evidence and the fact that some of the evidence that counsel failed to investigate or present does not involve violence or harmful behavior by Abdur'Rahman. *See Williams v. Taylor*, 120 S. Ct. 1495, 1514 (2000) (noting that the presence of unfavorable records did not justify "the failure to introduce

the comparatively voluminous amount of evidence that did speak in [petitioner's] favor").

Had counsel adequately performed, the jury weighing whether a death sentence was an appropriate punishment for Abdur'Rahman would have had a representative picture of the person they were sentencing, instead of the one-sided account upon which they based their decision. Like the petitioner recently before the Supreme Court, Abdur'Rahman has "a constitutionally protected right . . . to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." *Williams*, 120 S. Ct. at 1513. Given the total lack of mitigating evidence presented at Abdur'Rahman's sentencing hearing, "counsel's conduct so undermined the proper functioning of the adversarial process that the [sentencing hearing] cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686; *see also Austin*, 126 F.3d at 848; *Glenn v. Tate*, 71 F.3d 1204, 1210 (6th Cir. 1996). I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ABU-ALI ABDUR' RAHMAN,
Petitioner-Appellant
vs.
RICKY BELL
Respondent-Appellee

Nos. 98-6568/98-6569
CAPITAL HABEAS CORPUS

APPELLEE ABU-ALI ABDUR'RAHMAN'S MOTION TO WITHHOLD THE MANDATE AND GRANT REHEARING *EN BANC* OR REMAND FOR FURTHER PROCEEDINGS

Earlier today, the Supreme Court of the United States denied the Petition for a Writ of Certiorari filed by Appellee Abu-Ali Abdur'Rahman ("Appellee") to review this Court's judgment in this case. Accordingly, Appellee respectfully moves this Court for an Order withholding its mandate and directing either that the case will be reheard *en banc* or that the case will be remanded to the district court for further proceedings. This Court's authority to issue such an Order in light of the highly unusual intervening circumstances present in this case is clear. *Compare First Gibraltar Bank v. Morales*, 42 F.3d 895 (5th Cir. 1995) (granting rehearing, vacating judgment, and reaching different result after denial of certiorari based on intervening circumstances), *Bryant v. Ford Motor Co.*, 886 F.2d 1526 (9th Cir. 1989) (same), and *Alphin v. Henson*, 552 F.2d 1033 (4th Cir.), *cert. denied*, 434 U.S. 823 (1977) (same) *with Nyyssonen v. Bendix Corp.*, 356 F.2d 193, 193 (1st Cir.), *cert. denied*, 385 U.S. 846 (1966)

(denying leave to file motion for rehearing after denial of certiorari when motion "contains nothing of substance that could not have been asserted in a timely motion in response to our original opinion").

Specifically, this Motion rests on five distinct intervening developments that have occurred since this Court last considered this case: (i) intervening decisions of this Court that create a conflict with the decision in this case that can only be resolved *en banc*; (ii) the State's express argument to the Supreme Court, in opposition to Appellee's Petition for a Writ of Certiorari, that the patent inconsistencies between the panel opinion in this case and other Sixth Circuit precedent "should be resolved *by the Sixth Circuit* and not by a grant of certiorari" (emphasis added); (iii) an intervening decision of the U.S. Supreme Court with which the panel opinion in this case conflicts; (iv) the State's concession that the panel opinion in this case was simply wrong in a critical respect; and (v) an important intervening procedural Order of the Tennessee Supreme Court. Particularly given that this Court's previous Order denying rehearing *en banc* strongly suggests that the Court was narrowly divided at that time, Appellee's counsel file this Motion based on a sincere, good faith belief that these five intervening developments, alone or in combination, will lead the full Court to reconsider the case.

The relevant events relating to the issuance of the mandate in this case are as follows. On September 13, 2000, a divided panel of this Court entered its opinion reinstating Appellee's death sentence. 226 F.3d 696 (reversing the district court's decision, which is published at 999 F. Supp. 1073). On January 9 and 11, 2001, the panel entered a stay of mandate pending the filing and disposition of a Petition for a Writ of Certiorari. Appellee subsequently filed his Petition. Today, the Supreme Court denied the Petition.[1]

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[1] The Supreme Court also denied a motion by the State to strike the discussion by an *amicus curiae* of affidavits sworn to by a majority of the trial jurors stating that they likely would *not* have voted to impose the

The Clerk of the Supreme Court will provide a certified copy of the Supreme Court's Order to this Court. *See* S. Ct. R. 45.3. Absent a further Order of this Court, this Court's current stay of mandate (which is in place pending the filing and disposition of Appellee's Petition for a Writ of Certiorari) will then expire. *See* Fed. R. App. P. 41(d)(2). This Court, however, has the broad power to issue a distinct stay pending Appellee's further request for rehearing *en banc* and to grant rehearing subsequent to the denial of certiorari. *See* Fed. R. App. P. 41(d)(1); *supra* at 1-2 (collecting cases). For the reasons described in the Argument section below, this case presents extraordinary circumstances that merit withholding the mandate and granting *en banc* consideration, or at least remanding to the district court for further consideration.

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V. *En Banc* Consideration Is Warranted Because, On The Majority's Rationale, Appellee Is Entitled To The Benefit Of An Intervening Tennessee Supreme Court Order.

Finally, rehearing also should be granted in light of an intervening Order of the Tennessee Supreme Court providing that issues not presented in a discretionary application to that Court following an adverse decision of the Tennessee Court of Criminal Appeals shall be deemed exhausted. *See* Tenn. S. Ct. R. 39.[9] Alternatively, this Court should modify its

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death penalty had the available mitigation evidence been presented to them.

[9] Tenn. S. Ct. R. 39 provides: "In all appeals from criminal convictions or post-conviction relief from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim.

judgment to permit the district court to consider the effect of this Order.

The recent promulgation of Tenn. S. Ct. R. 39 is highly relevant to this case. The district court held that Appellee had failed to exhaust and had therefore procedurally defaulted a number of claims by failing to present them to the Tennessee Supreme Court in an application for discretionary review. The district court thus refused to consider a number of Appellee's claims of prosecutorial misconduct which, in fact, were properly exhausted according to Rule 39.[10] Appellee did not challenge that determination in this Court, principally because he had prevailed in the district court, and also because substantial page limits constrained the number of points he could raise.

In light of the Tennessee Supreme Court's intervening enactment of Rule 39, it is clear that the district court's legal conclusion was erroneous. Because the comity interests underlying the district court's finding of procedural default are therefore not in fact present, it would be appropriate for this Court to resolve the claims that the district court refused to resolve.[11] At the least, the Court should remand to the

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[10] These claims of prosecutorial misconduct include: whether the prosecution should have disclosed the statements of certain witnesses, the redacted portions of certain police reports, a memorandum in the prosecution's file concerning a bank account in the victim's name, the statement of the victim's brother together with lab reports about the victim, and information about Petitioner's bank account; whether the prosecution unconstitutionally influenced the co-defendant's testimony which was given as part of a plea bargain; whether the prosecution provided false information to the state mental health evaluators; whether the prosecution improperly manipulated the testimony of a key witness (in addition to the co-defendant); and whether the prosecution unconstitutionally misled defense counsel regarding Petitioner's prior murder conviction. *See* 999 F. Supp. at 1082, n.8.

[11] Appellee has not defaulted those claims in this Court. Appellee's argument only became apparent when the Tennessee Supreme Court issued its Order. In addition, for the reasons stated in the text, it was reasonable for Appellee (having prevailed in the district court) not to continue to pursue those claims in this Court. Finally, there can be no

district court to permit it to consider those claims in the first instance.[12]

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Court issue an Order providing that this Court's mandate shall be withheld and the case shall be reheard *en banc* or the case will be remanded to the district court for further consideration.

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reasonable dispute that, if this Court is going to consider issues not raised in the appellate briefing, it must do so evenhandedly. Hence, the Court would be justified in raising the Tennessee Supreme Court's ruling *sua sponte*.

[12] Appellee is preparing to file with the district court a protective motion under Fed. R. Civ. P. 60(b) that is based on the Tennessee Supreme Court's rulle.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:96-0380

ABU-ALI ABDUR'RAHMAN
v.
RICKY BELL

PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FED.R.CIV.P. 60(b)

Petitioner Abu-Ali Abdur'Rahman (formerly James Lee Jones) hereby moves the Court for relief from this Court's judgment entered April 8, 1998 (Docket Nos. 205, 206), in which this Court dismissed a number of Petitioner's prosecutorial misconduct claims on non-exhaustion and procedural default grounds. *See Abu-Ali Abdur'Rahman v. Ricky Bell*, 999 F.Supp. 1073, 1079-83 & n.8. Petitioner's prosecutorial misconduct claims that were dismissed by this Court should be reinstated and addressed by this Court on the merits because of the recent promulgation of Rule 39 of the Rules of the Supreme Court of the State of Tennessee. These prosecutorial misconduct claims should be addressed both independently and cumulatively with the ineffective assistance of counsel claims and the other errors in this case. The evidentiary record supporting these claims has already been established in this proceeding. This Motion is made under Rule 60(b)(6) of the Federal Rules of Civil Procedure and Rule 11 of the Rules Governing Section 2254 Cases. This Motion is also made under the Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution.

In support of this Motion, Petitioner states as follows:

BACKGROUND

1. This capital habeas corpus proceeding was commenced by a *Pro Se* Petition filed on April 23, 1996 (Docket No. 1), seeking federal habeas relief under 28 U.S.C. § 2254.[1] Petitioner's claims for relief are set forth in Petitioner's Amended Petition for Writ of Habeas Corpus in a Capital Case filed with this Court on December 2, 1996 (Docket No. 37) (the "Amended Petition").

2. On May 28, 1996, this Court entered an Order staying Petitioner's execution until further order of the Court. (Docket No. 24). The stay of Petitioner's execution under this Order remains in effect.

3. The Amended Petition seeks relief from Petitioner's Tennessee first degree murder conviction (as well as his other Tennessee convictions) and his death sentence (as well as his other sentences). The grounds for relief include, but are not limited to, ineffective assistance of counsel and prosecutorial misconduct in violation of Petitioner's rights under the Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and Fourteenth Amendments to the United States Constitution. Petitioner's prosecutorial misconduct claims are set out in Part D of the Amended Petition.

4. This Court conducted an evidentiary hearing in this case commencing in February, 1998. The record established in that hearing supports the claims for habeas relief the Petitioner is raising in this Motion.

5. On April 8, 1998, this Court entered a judgment in this case, which is reported at 999 F.Supp. 1073 (the "April 1998 Judgment") (Docket Nos. 205, 206). This Court granted Petitioner relief from his death sentence on grounds of

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[1] This case is governed by the provisions of Section 2254 that were in effect at the time of the filing of the Petition, before the effectiveness of the amendments provided in the Antiterrorism and Effective Death Penalty Act of 1996.

ineffective assistance of counsel. This Court denied Petitioner relief from his first degree murder conviction.

6. In the April 1998 Judgment, this Court addressed two of Petitioner's prosecutorial misconduct claims: (i) the *Brady* claim arising from the prosecution's failure to turn over the "1972 transcript" from Petitioner's prior murder case and (ii) the *Brady* claim arising from the prosecution's failure to turn over the T.B.I. report on the "blood evidence." *See* Amended Petition, ¶¶ D.1.(1) and D.1.(7). With respect to the "1972 transcript" prosecutorial misconduct claim, this Court found that the prosecution did violate its *Brady* obligation by failing to produce the transcript to the defense; but this Court concluded that, "standing alone," this violation was not material. 999 F.Supp. at 1089-90. With respect to the prosecutorial misconduct claim concerning the T.B.I "blood evidence" report, this Court determined that there was no *Brady* violation. *Id.* at 1090.

7. In a previous Order, this Court addressed Petitioner's "sentencing stage prosecutorial misconduct" claim relating to the prosecution's presentation of inadmissible information to Petitioner's sentencing jury in blatant violation of the trial court's prior ruling (issued just moments before the information was passed to the jury) that the information was inadmissible and after the prosecution assured the court that would not happen. *See* Amended Petition, ¶ D.6. In Petitioner's direct appeal, the Tennessee Supreme Court reprimanded the prosecution and said that this conduct "bordered on deception" and was "improper." *State v. Jones*, 789 S.W.2d 545, 551-2 (Tenn. 1990). This Court evaluated this error in isolation and found that it was harmless.

8. This Court dismissed Petitioner's remaining prosecutorial misconduct claims on the ground that those claims were not presented in Petitioner's motion to the Tennessee Supreme Court for permission to appeal from the lower state courts' denial of post-conviction relief. *See* 999 F.Supp. at 1081, n.8. Petitioner had presented the substantial body of his prosecutorial misconduct claims to the Tennessee

Court of Criminal Appeals, as more fully set forth below. Tennessee Supreme Court review of a post-conviction case is merely discretionary. Despite Petitioner's contention to this Court that federal exhaustion did not require that claims must be presented to the Tennessee Supreme Court on a request for discretionary appeal,[2] this Court held that these claims were not exhausted and were therefore procedurally defaulted. *Id.* at 1080.

9. Respondent appealed from this Court's Judgment granting Petitioner relief from his death sentence. Petitioner appealed from this Court's Judgment denying relief from his conviction.

10. In Respondent's appeal, in the face of the overwhelming and unrebutted mitigation evidence presented to this Court which demonstrated that Petitioner was prejudiced by ineffective assistance of counsel, Respondent never challenged and therefore abandoned any claim concerning this Court's finding of ineffective assistance of counsel at sentencing based upon this Court's evidentiary record. Respondent's only argument on appeal was that this Court should not have conducted an evidentiary hearing and instead should have relied entirely upon the state court's ruling on ineffective assistance of counsel. The issue of whether the evidentiary record in this Court supports this Court's finding of ineffective assistance of counsel at sentencing was never briefed by the parties nor discussed at the oral argument before the Sixth Circuit.

11. On September 13, 2000, the Sixth Circuit issued its decision, reported at 226 F.3d 696. Each of the members of the three judge panel issued a separate opinion. In a split decision (Judges Siler and Cole), the Sixth Circuit panel ruled that this Court did have the authority to conduct an evidentiary hearing and to expand the record on Petitioner's claims. However, also in a split decision, the Sixth Circuit

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[2] *See* Response to Respondent's First Motion for Summary Judgment, pp. 45-52 (Docket No. 91).

panel *sua sponte* addressed the issue that Respondent had never raised and therefore had abandoned on appeal, and that the parties neither briefed nor argued in the appeal: whether this Court's evidentiary record supports a finding of ineffective assistance of counsel at sentencing. On this issue, the majority of the panel (Judges Siler and Batchelder) ruled that this Court's finding of ineffective assistance of counsel at sentencing was in error, and accordingly the Sixth Circuit reversed this Court's finding of prejudice at sentencing and vacated this Court's judgment granting the petition for a writ of habeas corpus as to Petitioner's death sentence. *Id.* at 715. Judge Cole dissented.

12. Petitioner filed a Petition with the Sixth Circuit requesting a rehearing or a rehearing *en banc*. Respondent was directed to respond to this Petition and this Petition was circulated to the full Court. This Motion was subsequently denied.

13. Petitioner filed with the United States Supreme Court a Petition for a Writ of Certiorari. This Petition, Respondent's Response, and the other briefs filed in support of this Petition, have been filed with this Court. (*See* Docket Nos. 240-245).

14. On October 9, 2001, the Supreme Court just denied Petitioner's petition for certiorari. Out of deference to the Supreme Court, Petitioner's counsel have waited until the Supreme Court ruled on the petition for certiorari before filing this Motion.

15. On October 10, 2001, Petitioner filed with the United States Court of Appeals for the Sixth Circuit a Motion to Withhold the Mandate and Grant Rehearing *En Banc* or Remand for Further Proceedings. The Sixth Circuit directed Respondent to respond to this Petition. Respondent filed a Response, and Petitioner filed a Reply to the Response. Copies of these papers (without accompanying appendices) have been filed with this Court. *See* Petitioner's Status Report Dated November __, 2001, being filed contemporaneously herewith. Petitioner also intends to file

with the Supreme Court a petition for rehearing of the order denying Petitioner's petition for certiorari. *See* Rule 44.2 of the Rules of the Supreme Court (allowing 25 days for the filing of such a petition).

TENNESSEE SUPREME COURT RULE 39

16. On June 28, 2001, while Petitioner's United States Supreme Court petition for certiorari was pending, the Tennessee Supreme Court clarified pre-existing Tennessee law on exhaustion of claims by issuing an Order which established new Rule 39 of the Rules of the Supreme Court of the State of Tennessee, a copy of which is attached hereto as Exhibit A. This Order provides:

> In 1967 the General Assembly created the Tennessee Court of Criminal Appeals in order to reduce the appellate backlog in criminal cases. In most criminal and post-conviction cases, review of a final order of the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion. Permission to appeal will be granted by this Court only where special and important reasons justify the exercise of that discretionary review power. Tenn.R.App.Proc.11. We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for permission to appeal upon the Court of Criminal Appeals' denial of relief in order to exhaust all available state remedies for purposes of federal habeas corpus litigation. In order to clarify that denial of relief by the Court of Criminal Appeals shall constitute exhaustion of state remedies for federal habeas corpus purposes, we hereby adopt the following Rule 39, Rules of the Supreme Court, as stated below.
>
> In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court

of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tennessee Code Annotated, § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

17. Tenn.S.Ct.R. 39 unambiguously demonstrates that a Tennessee Appellate Rule 11 discretionary appeal to the Tennessee Supreme Court has never been available under Tennessee law in order to exhaust state remedies. This Court must give sanction to the Tennessee Supreme Court's interpretation of the exhaustion requirements in Tennessee.

18. Based upon Tenn.S.Ct.R. 39, it is now apparent that this Court erred in dismissing a substantial body of Petitioner's prosecutorial misconduct claims on "non-exhaustion" and "procedural default" grounds. As set forth below, these claims were properly presented to the Tennessee Court of Criminal Appeals in Petitioner's state post-conviction appeal and were therefore exhausted and preserved for federal habeas review.

THE PROPERLY PRESENTED AND EXHAUSTED CLAIMS

19. Attached hereto as Exhibit B is a true copy of the Brief of Appellant timely filed on April 25, 1994, with the Tennessee Court of Criminal Appeals in Petitioner's appeal as of right from the trial court judgment in the state post-

conviction proceeding. In accordance with Tenn.S.Ct.R. 39, all of the claims stated in this Brief were properly exhausted.

20. The properly exhausted prosecutorial misconduct claims that Petitioner presented in his state court appeals as of right and that this Court must consider on the merits in this habeas proceeding are set forth in Petitioner's Amended Petition under the following paragraphs:

Claim D.1.(1). Brady violation -- prosecution's failure to produce 1972 murder trial transcript.

Claim D.1.(2). Brady violation -- Prosecution's failure to produce transcription of Miller's pretrial statement.

Claim D.1.(3). Brady violation -- Prosecution's failure to produce Miller's statements to the prosecution regarding the involvement of the SEGM in the alleged offenses.

Claim D.1.(4). Brady violation -- Prosecution's failure to produce other Miller statements.

Claim D.1.(6). Brady violation -- Prosecution's failure to produce the redacted portion of Detective Garafola's report.

Claim D.1.(7). Brady violation -- Prosecution failure to produce lab reports indicating no blood stains on clothes.

Claim D.1.(8). Brady violation -- Prosecution's failure to produce other police reports.

Claim D.1.(12). Brady violation -- Prosecution's failure to produce information about Petitioner's bank account.

Claim D.2.(1). Altering evidence -- Prosecution's improper alteration of Miller's testimony.

Claim D.2.(2). Altering evidence -- Prosecution's false and misleading information to MTMHI.

Claim D.2.(3). Altering evidence -- Prosecution's improper manipulation of Norman's testimony.

Claim D.3. Prosecution's is representations to defense counsel regarding the prior 1972 conviction.

Claim D.6. Sentencing stage misconduct -- Prosecution violated trial court's instructions and passed inadmissible information to the jury after assuring the trial court that would not happen.

Claim D.8.(4). Prosecutorial Misconduct -- Prosecution made improper sentencing stage instruction regarding the SGM.

CUMULATIVE EFFECT OF THESE CLAIMS

21. Prosecutorial misconduct claims must be considered by the Court in the context of, and cumulatively with, all of Petitioner's other claims; these kinds of claims cannot be considered in isolation, "standing alone."

22. Accordingly, the prosecutorial misconduct claims identified in Paragraph 21 above that were improperly dismissed by this Court must be considered cumulatively with all of Petitioner's other claims, including: those prosecutorial misconduct claims that this Court did previously consider [the ¶ D.1.(1) Brady claim relating to the 1972 transcript, the ¶ D.1.(7) claim relating to the blood evidence, the ¶ C.7.(1) claim relating to the "Heinous, Atrocious and Cruel" sentencing stage instruction and aggravator,[3] and the ¶ D.6

[3] The ¶ C.7.(1) relating to the unconstitutional "Heinous, Atrocious and Cruel" aggravator and sentencing stage jury instruction was rejected by this Court. (Docket No. 123). Petitioner appealed this ruling to the Sixth Circuit. The Sixth Circuit did not uphold the constitutionality of this aggravator and sentencing stage instruction, but denied this claim on the separate ground that the "error" was "harmless in that it did not have a substantial and injurious effect or influence in determining the jury's verdict." 226 F.3d at 711. The Sixth Circuit, however, explicitly considered this claim in isolation, without viewing it in the context of the unpresented mitigation evidence or the combined effects of the ineffectiveness of Petitioner's trial counsel and the prosecutorial misconduct in this case. As other claims are addressed on the merits, this claim must be reevaluated under a new harmless error analysis that views this claim in the context of all and cumulatively with the other errors in the case.

claim relating to the prosecution's presentation of inadmissible information to the jury]; and Petitioner's ineffective assistance of counsel claims at both the guilt and sentencing stages of Petitioner's trial. These claims must be cumulated to determine (i) guilt stage issues, including but not limited to Petitioner's defenses that, based on the blood evidence, he was not the assailant and, based upon the mental health evidence, he was insane or at least lacked the *mens rea* for first degree capital murder; (ii) the effect of the viable but unpresented guilt stage defenses on the sentencing stage prejudice analysis; and (iii) the effect of all the errors on the prejudice Petitioner suffered at the sentencing stage. To the extent this Court has previously addressed these other claims, this Court must reconsider them in light of the cumulative effect created by all of the errors that occurred in this case.

23. As this Court previously found, this is a case where "abundant," "compelling," and important evidence was never investigated by Petitioner's trial counsel and therefore never presented to the jury. But, when all of Petitioner's claims are viewed cumulatively and in context, this case is more than that. The foregoing prosecutorial misconduct claims, when considered in their totality along with the other errors in this case, establish more than the withholding of evidence and even more than individual instances of intentional prosecutorial fraud and deception. They also establish a

deliberate pattern and scheme of prosecutorial fraud and deception during the entire course of the case, from indictment to sentencing. Because of the prosecution's persistent and deliberate pattern of misconduct combined with the ineffective assistance of defense counsel and other errors in this case, the jury was presented with a completely false picture of every aspect of this case. As a result of all of wrongs, Petitioner's trial was a sham. Petitioner never had his day in court. There can be no confidence in the outcome of Petitioner's capital trial with respect to either guilt or sentencing.

24. The prosecutorial misconduct claims provide independent and sufficient grounds for granting Petitioner relief. The fraud and deception practiced by the prosecution amounts to a *per se* violation of Petitioner's due process and Eighth Amendment rights. Moreover, the prosecutorial misconduct claims, when viewed cumulatively along with Petitioner's ineffective assistance of counsel claims and the other errors that occurred in Petitioner's case, establish that Petitioner was grossly prejudiced at both the guilt and sentencing stages of Petitioner's trial.

RULE 60(b) GROUNDS FOR RELIEF

25. Fed.R.Civ.P. 60(b)(6) allows the Court to relieve a party from a final judgment or order, upon such terms as are just, "for any reason justifying relief from the operation of the judgment."

26. Rule 60(b)(6) vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice. When a federal court denies relief based upon its understanding and application of state law, but a subsequent action by the state supreme court establishes that the federal court misunderstood state law, relief under Rule 60(b)(6) is appropriate to ensure justice. Rule 60(b)(6) relief is particularly appropriate in habeas proceedings involving extraordinary circumstances, such as Petitioner's case, in which conventional notions of finality have no place.

27. The claims asserted by Petitioner in this Motion are not new claims, but are claims that were asserted from the outset of this habeas proceeding. The evidence supporting these claims is contained in the evidentiary record already established in this proceeding. Cf. Petitioner's Post-Hearing Brief, pp. 49-79 (Docket No. 202). Accordingly, this motion does not constitute a "successive" or "second" habeas petition.

28. In light of the recent promulgation of Tenn.S.Ct.R. 39, it is clear that this Court's dismissal of a substantial body of Petitioner's prosecutorial misconduct claims was in error. The improperly dismissed claims, viewed both independently and cumulatively along with Petitioner's ineffective assistance of counsel claims, establish that Petitioner should be granted habeas relief.

29. For all of the reasons stated above, Rule 60(b)(6) relief is warranted because of the existence of extraordinary circumstances and because the April 1998 Judgment would cause extreme and undue hardship, to say the least. It would be a profound and irreparable miscarriage of justice to deny Petitioner the relief requested herein.[4]

30. In support of the relief requested herein, Petitioner relies upon the entire record in this case.

WHEREFORE, Petitioner prays for the following relief:

1. Withholding of the issuance of any final judgment or mandate until this motion can be fully considered by the Court.

2. Oral argument on this Motion.

3. An Order indicating that this Court is inclined to grant this Motion and permitting Petitioner to file any appropriate

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[4] It would be a cruel irony to preclude Petitioner from presenting his prosecutorial misconduct claims only because his state court-appointed counsel failed to present those claims in a petition for discretionary appeal in the state proceedings when, in this federal habeas proceeding, the Sixth Circuit reinstated Petitioner's death sentence on a ground that was never presented and was therefore abandoned by the state in its appeal.

or necessary motion with the Sixth Circuit for a remand of the case on appeal for purposes of deciding this Motion; and, in that connection, certification of an order to the Sixth Circuit requesting that the record of this case be returned to this Court so that this Motion can be decided.

4. An Order granting Petitioner relief from this Court's April 1998 Order, and declaring that all of Petitioner's prosecutorial misconduct claims described above were properly exhausted in the state proceedings and shall be addressed on the merits by this Court in this habeas proceeding.

5. Upon final review of all of Petitioner's claims, viewed both independently and cumulatively, an Order granting Petitioner a writ of habeas corpus setting aside Petitioner's convictions and sentences.

6. Such other relief as the Court may find appropriate in the interests of justice.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ABU-ALI ABDUR'RAHMAN
v.
RICKY BELL, Warden

No. 3:96-0380
Capital Habeas Corpus
Oral Argument Requested

MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FED.R.CIV.P. 60(b)

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I. Introduction

In 1998 this Court ruled that Petitioner's claims of prosecutorial misconduct had not been exhausted in state court and were therefore defaulted. This was error. Tennessee Supreme Court Rule 39 (hereinafter "Rule 39"), promulgated in June of this year, clarified that, since 1967, a petition for discretionary review by the Tennessee Supreme Court is not necessary for exhaustion purposes. This Court's dismissal of the prosecutorial misconduct claims prevented a full consideration of the cumulative effects of all instances of prosecutorial misconduct within the context of the ineffective assistance of counsel at Petitioner's trial. While it is an extraordinary measure, the granting of a Rule 60(b) motion in this case is both proper and necessary. Justice requires a full and fair review of the cumulative effects of errors, fraud and deception committed by the attorneys at trial. Further, it requires a ruling on the likely result of the trial had the jury been presented with full, fair and accurate proof about the offense and the Petitioner himself.

A. All material and significant aspects of this case were prejudicially distorted by the deceit of the prosecution and the failures of defense counsel.

The law requires that prosecutorial misconduct and the failures of defense counsel be considered together in order to determine whether the result of the trial was fair and reliable. This memorandum describes how prosecutorial misconduct and ineffective assistance of counsel in Petitioner's case created a trial that was fundamentally unfair and led to an outcome that was highly unreliable. It details instances in which the prosecution intentionally withheld exculpatory information and engaged in fraud and deception. It also reviews the instances in which defense counsel failed to present Petitioner's defenses and to rebut the prosecutor's fraudulent case.

Collectively, the errors of prosecution and defense distorted every material aspect of this case including: (i)

Petitioner's altruistic motives rather than criminal intent; (ii) the influence on Petitioner of the Southeastern Gospel Ministry (SGM) and the role of members of the SGM in the commission of the offense; (iii) Petitioner's non-involvement in the stabbing of the victims; (iv) potential but unpresented guilt stage and sentencing stage mental state defenses; (v) the inadmissible and rebuttable prosecution proof regarding Petitioner's prior criminal convictions; and (vi) compelling mitigating evidence that was available, but unpresented, to the jury.

Appendix A is a summary of the instances in which the nonfeasance and malfeasance of the prosecutor and the defense attorney, collectively and cumulatively, eliminated any opportunity that the trial of this case had to be fair and reliable.

B. State and federal courts collaterally reviewing this case have recognized that the trial was severely flawed, even without cumulating error.

Every court, state and federal, that has collaterally reviewed this case has found that trial counsel's performance was constitutionally inadequate in both the guilt and sentencing stages. *See, e.g., Abdur'Rahman v. Bell*, 999 F.Supp. 1073, 1095. The disagreement among the reviewing courts with regard to the effectiveness of defense counsel has been the question of prejudice, not performance.

Upon the only presentation to date of a complete factual record of Petitioner's claims and defenses in this case, this Court found counsel's performance at sentencing to have been sufficiently prejudicial to require the sentence of death to be set aside. *Id.*, at 1091-1102. This Court found the unpresented mitigating evidence that the jury did not hear to be "very impress[ive]," "vivid," "significant," "extremely credible," "compelling," and "overwhelming." *Id.* The Court found the failures of trial counsel to provide this evidence to the sentencing jury to be "grave," "serious," "very significant," "substantial," "breathtaking[]," and "grievous." *Id.*

In reaching this decision, however, this Court improperly failed to consider the failures of counsel collectively and cumulatively with the instances of prosecutorial misconduct and other errors.

Upon circuit review, in a split decision, in which three different opinions were filed, one member of the three judge panel agreed with this Court. *See, Abdur-Rahman v Bell*, 226 F.3d 696, 719-724 (6th Cir. 2000). In dissent, Judge Cole recognized that trial counsel's "preparation for and presentation at the sentencing hearing, was constitutionally inadequate . . . . [in that counsel] completely failed to investigate and present Abdur'Rahman's mental health history, his institutional history, or other mitigating evidence." *Id.* at 720. He further noted that had defense counsel investigated and prepared, the jury would have heard mitigation evidence that Petitioner "has a history of traumatic abuse as a child, that he had a long history of mental health problems, and treatments, and, finally, that Abdur'Rahman had previously been a productive member of society." *Id.* at 721. Thus, two of the four federal judges who have reviewed this case have found the deficient performance of counsel at the sentencing stage alone to be sufficient to require the sentence of death to be set aside.

The proof presented in this Court, that Petitioner's prejudice in the sentencing stage of the trial was a result of trial counsel's ineffectiveness, was so strong that the state did not even contest the merits of this Court's decision on appeal. Without advance notice to the parties or an opportunity to be heard, however, the majority of the circuit panel *sua sponte* reinstated the sentence of death on an issue that had been abandoned by the state, not included in the briefs, and not addressed during oral argument. Despite the presentation of an expansive record before this Court, the panel majority did not discuss the proof presented in support of the claim of the ineffectiveness of counsel at the sentencing stage, except in the most cursory and conclusory way.

Petitioner's petition to rehear with the Sixth Circuit Court

of Appeals that was circulated to the *en banc* court. Upon the information and belief of undersigned counsel, the vote among the then-active judges on the petition to rehear was as close as it possibly could have been without resulting in an order to rehear. Consequently, the petition to rehear was denied and the panel majority decision to reinstate the death sentence stood.

A petition for certiorari to the United States Supreme Court was denied on October 9, 2001. Petitioner filed a Motion to Withhold the Mandate and Grant Rehearing *En Banc* or Remand for further Proceedings with the Sixth Circuit Court of Appeals, on October 10, 2001. That motion is presently pending before the Court of Appeals.

C. The post-trial reaction of trial jurors to information not presented at trial demonstrates that the result of the trial would have been different if available evidence had been presented.

The results of post-trial interviews of the jurors who deliberated in this case make it obvious that the outcome of the sentencing hearing would have been different if the available mitigating evidence had been presented to them. The original affidavits from eight of the jurors who deliberated in this case are being filed contemporaneously herewith.[1] Excerpts from each of the eight juror affidavits include the following:

Juror Bonnie M. Meyer: "In the sentencing stage of the trial, I did not want to give the defendant the death penalty. I did not think the evidence was strong enough for the death penalty. I was one of the last hold-outs on the jury to vote for

[1] The eight juror affidavits were before the United States Supreme Court on the Petition for a Writ of Certiorari that was denied on October 9, 2001. The juror affidavits were attached to the brief of *amici curiae*, the National Mental Health Association, et. al. The Court accepted the juror affidavits into the record over the state's motion to strike. *See*, *Abdur'Rahman v Bell*, 2001 WL 575672., Sup. Ct. No. 00-1742, October 9, 2001.

the death penalty. . . . If I had known anything about the defendant's background, that he had been abused as a child, and that he may have suffered from a mental disorder or mental illness that could help explain why he did what he did, then I do not believe I would have voted for the death penalty."

Juror Alice Stoddard: "I would have wanted to know then about Mr. Jones's history of mental illness and the nature of the facts about his 1972 murder conviction relating to homosexual assault against him. I would have been interested in the fact that no blood was found on Mr. Jones' coat and in particular I think that the facts of his childhood abuse and corresponding mental illness should have been made known to us as jurors in some detail. We would have wanted to consider all this evidence. I believe I would have voted for a life sentence for Mr. Jones rather than death had I heard the factual evidence I have just mentioned. I do not believe this information should have been withheld from us."

Juror Jimmy Swarner: "I would have wanted to hear everything about Mr. Jones' life before deciding on his sentence. I would have wanted to know all about the way his father treated him and about his mental problems. . . . I don't want Mr. Jones to be put to death."

Juror Scarlett McAllister Smith: "I certainly would have wanted to see the TBI lab report which showed Mr. Jones had no blood on his clothes. I would have wanted to know all about Mr. Jones' extensive mental health history including treatment, diagnoses, and attempted suicides. We should have been informed about the abuse experienced at the hands of his father which occurred when he was young. I really would have wanted to have heard from his wife about his behavior--talking to nonexistent people and animals--and also heard about his family's mental health problems."

Juror Yolanda Howard: "It is my belief I would have voted for life for Mr. Jones rather than death if I had heard the details of this man's life and the extent of his mental illness. We didn't have a chance to understand Mr. Jones at all

because we weren't informed. Another thing that really bothers me is we did not see the TBI lab report about the blood tests. It seems important that we should have known that no blood was found on Mr. Jones clothes, especially since they showed us pictures with all the blood in them. Seeing those pictures was really upsetting to me. It might really have made a difference to me if I had heard testimony about the lack of blood on Mr. Jones's clothes. Basically, I am upset that all this information was withheld from us in deciding this man's life. That is a hard decision to make and I think we should have had complete information."

Juror Loretta L. Galloway Simpson: "I am truly bothered by all the information withheld from us: no blood stains on Mr. Jones's clothes based on the TBI lab report, history of awful childhood abuse, the truth about his earlier conviction being related to homosexual threats against him in prison, to name part of what I am troubled about. I wouldn't want to have my case handled this way, if it had been me, not Mr. Jones. I would have wanted them to present everything about me - whether it was for me or against me. Mr. Jones sounds like he needs help. If he has mental problems, death is not the answer. I do not want Mr. Jones executed under these conditions. I absolutely, as a juror, would have wanted to have heard all the information about Mr. Jones before deciding his sentence - life or death. Given all the history of mental illness Mr. Jones has, I would have voted for a life sentence. I most definitely would have voted for life even then."

Jury Foreman Everett C. Stone III: "[I]t is my belief and opinion that this evidence would have made a significant difference in the sentencing phase of the trial. Further, given the nature of the evidence, I would further offer for consideration that the death penalty be over-turned in this case."

Juror James D. Wimberly: "We were not given information detailing Mr. Jones's mental illness and hospitalizations. I am truly bothered by all the information

withheld from us: no blood stains on Mr. Jones' clothes based on the TBI lab report, history of awful childhood abuse, the truth about his earlier conviction being related to homosexual threats against him in prison, to name part of what I am troubled about. I especially think we should have known the details of his previous murder conviction being related to homosexual threats in prison. That previous conviction swayed me to vote for death. The results would have been different at sentencing if I had heard the true facts."

The substance of these juror's affidavits further demonstrate both the unfairness and the unreliability of Petitioner's trial. There is more than a reasonable likelihood that the outcome of the trial would have been different had the jury not been deceived by the prosecutor and failed by the defense attorney. In Tennessee, if one juror holds out for a life sentence, the defendant avoids the death penalty. See T.C.A. 39-2-203(h). In light of this fact, it is virtually certain that, had the proper case been presented, the outcome of Petitioner's trial would have been different.

II. The relationship between claims deemed defaulted by this Court, O'Sullivan v. Boerckel, Tenn. Sup. Ct. R. 39, Tenn. R. App. P. 11, and F. R. C. P. 60(b).

A. This Court dismissed numerous claims as defaulted because they were not presented in a discretionary appeal to the Tennessee Supreme Court.

In his petition for writ of habeas corpus, Petitioner raised numerous claims of prosecutorial misconduct. *See, generally, Amended Petition For Writ Of Habeas Corpus*, pp. 53-75, ¶¶ D1-D8. In response to these claims, this Court found that many of them were procedurally defaulted because, although they were presented on appeal to the Tennessee Court of Criminal Appeals, such claims had not been presented to the Tennessee Supreme Court in an application for permission to appeal. *See, Abdur'Rahman v. Bell*, 999 F.Supp. 1073, 1080-1082 (M.D.Tenn. 1998). Particularly, *see*, 999 F.Supp. at 1082 n. 8, in which this

Court dismissed claims ¶¶ D1(2) through (6), D1(8) through (12), D2(1) through (3), D3, D5(1) through (4), D8(1) through (3), D8(5) through (8).

Before this Court's 1998 dismissal of the prosecutorial misconduct claims, Petitioner had maintained to this Court that he was only required by Tennessee law to seek review in the Tennessee Court of Criminal Appeals in order to satisfy federal exhaustion requirements. Petitioner maintained that he was not required to seek discretionary review in the Tennessee Supreme Court under Tenn. R. App. P. 11 (hereinafter "Rule 11"), on the basis that Rule 11 did not contemplate such an application as a prerequisite for federal exhaustion. *See, Petitioner's Response To Respondent's First Motion For Partial Summary Judgment* at 45-52, R. 91. Nevertheless, this Court rejected Petitioner's arguments and concluded that the substantial body of Petitioner's prosecutorial misconduct claims were defaulted on the ground that exhaustion required presentation -of claims in an application for discretionary review. In the course of reaching this conclusion, this Court relied on the authority of *Silverburg v. Evitts*, 993 F.2d 124, 126 (6th Cir. 1993). *See*, *Abdur'Rahman, supra*, 999 F.Supp. at 1080. In fact, in *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S.Ct. 1728 (1999), the United States Supreme Court resolved the split among the circuits and ruled consistently with the Sixth Circuit decision in *Silverburg*.[2] *See*, discussion, *infra*.

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[2] Because the Sixth Circuit's exhaustion rule was inconsistent with Petitioner's position, Petitioner concluded it to be futile to consume briefing space on appeal challenging the procedural ruling by this Court. The wisdom of Petitioner's decision in this regard was borne out by the Supreme Court's ruling in *O'Sullivan*, which was issued while the parties were preparing their Sixth Circuit briefs in this case. As will subsequently be explained in greater detail, while the *O'Sullivan* rule generally requires that claims be raised in a discretionary appeal to the state's highest court in order to exhaust for federal purposes, it left the door open for the states to have a contrary rule. Subsequent to *O'Sullivan*, the Tennessee Supreme Court stepped through this door and made it clear that its Rule 11 discretionary appeal had never been available for federal exhaustion. *See*, discussion, *infra*. The promulgation of Rule 39 with the sanction of the United States Supreme Court in *O'Sullivan* has rendered this Court's prior ruling on this issue incorrect and has made this Rule 60(b) motion possible.

B. Newly promulgated Rule 39 demonstrates that a discretionary appeal to the state Supreme Court is not available—and has never been available—for the purpose of federal exhaustion.

> *Determination of the meaning of a statute begins with the plain language of the statute itself. United States v. Ron Pair Enterprises, Inc.*, 109 S.Ct. 1026, 1030 (1989); *Bradley v. Austin*, 841 F.2d 1288, 1293 (6th Cir. 1988).

On June 28, 2001, the Tennessee Supreme Court issued an Order and released Tenn. S. Ct. R. 39 which emphasizes that, since 1967, permission to appeal to the Tennessee Supreme Court following any denial of relief by the Tennessee Court of Criminal Appeals is not, and has not been, available for the purpose of federal exhaustion. *See, Order*, filed June 28, 2001 promulgating Rule 39, attached hereto as Appendix B. Rule 39 supports Petitioner's assertions in this Court, that his post-conviction claims were exhausted so long as they were presented to the Tennessee Court of Criminal Appeals. Rule 39 states:

> From criminal convictions or post-conviction relief matters **from and after July 1, 1967, a litigant shall not be required** to petition for rehearing or to file an application for permission **to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error**. Rather, when the claim has been presented to

> the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. (Emphasis added.)

The Preamble to Rule 39 provides, as follows:

> In 1967, the General Assembly created the Tennessee Court of Criminal Appeals in order to reduce the appellate backlog in criminal cases. In most criminal and post-conviction cases, review of a final order of the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion. **Permission to appeal will be granted by this Court only where special and important reasons justify the exercise of that discretionary review power. Tenn. R. App. Proc. 11.** We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for permission to appeal upon the Court of Criminal Appeals' denial of relief in order to exhaust all available state remedies for purposes of federal habeas corpus litigation. In order to clarify that denial of relief by the Court of Criminal Appeals shall constitute exhaustion of state remedies for federal habeas corpus purposes, we hereby adopt the following Rule 39, Rules of the Supreme Court, as stated below. (Emphasis added.)

Rule 39 applies "in all appeals from post-conviction relief matters from and after July 1, 1967," and therefore applies to all of the claims in this case.

In contrast, a Rule 11 discretionary appeal is granted for purposes that concern the Tennessee Supreme Court's functions as the highest court in the state: i.e., uniformity of law, public policy, and supervisory authority. Tenn. R. App. P. 11 provides:

> (a) An appeal by permission may be taken from a final decision of the Court of Appeals or Court of Criminal Appeals to the Supreme Court only on application and in the discretion of the Supreme Court. In determining whether to grant permission to appeal, the following, while neither controlling nor fully measuring the court's decision, indicate the character of reasons that will be considered: (1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for the exercise of the Supreme Court's supervisory authority.

In fact, the Advisory Commission Comments to this rule provide that a Rule 11 application "is not designed to serve the office of arguing the merits of the decision of the intermediate appellate court." Consistently, the state's Answer in Opposition to Application for Permission to Appeal in response to Petitioner's Rule 11 application in this case argued:

> The petitioner is merely asking this Court for another review of the trial court's dismissal of the post-conviction petition. Petitioner has not demonstrated the existence of reasons such as would permit discretionary review by this Court.

State's Opposition at 2. This argument defies the purpose of the federal execution doctrine, which is precisely to insure that the state courts have an opportunity to rule on the merits of claims challenging state court convictions prior to any federal action.

Taken together, Rule 39, the Preamble to Rule 39, and Rule 11 make it clear that since the creation of the Tennessee

Court of Criminal Appeals in 1967[3], any application to the Tennessee Supreme Court from a decision of the Tennessee Court of Criminal Appeals has not been an appeal of right, but rather has been an appeal governed by Rule 11 as applied within the discretion of the Supreme Court. The Rule 11 discretionary appeal has always been limited to claims "where special and important reasons justify the exercise of that discretionary review power. Tenn. R. App. Proc. 11." Preamble to Rule 39. Accordingly, as Rule 39 makes clear, the limitations imposed on discretionary appeals by Rule 11 do not include federal exhaustion. Thus, in this case, a Rule 11 discretionary appeal was not available for the exhaustion of Petitioner's claims.

Further, this case presents no question concerning the retroactive or retrospective application of Rule 39, since the Rule only memorializes what the law has been since 1967 and was in 1995, after the Court of Criminal Appeals affirmed the trial court's denial of post-conviction relief, when the only discretionary appeal was sought in Petitioner's case.

C. Federal courts recognize the authority of a state's highest court to determine that claims need not be raised in a state discretionary appeal to the highest court in order to satisfy federal exhaustion requirements.

> *It would be a strange rule of federalism that ignores the view of the highest Court of a*

[3] Also on July 1, 1967, the Tennessee Post-Conviction Procedures Act took effect. Tenn. Pub. Acts, Ch. 310, formerly codified at T.C.A. § 40-3801, *et seq.*, and currently codified at T.C.A. § 40-30-101, *et seq.* The state post-conviction procedures are defined solely by the statute that codifies them. Both the Court of Criminal Appeals and the state post-conviction procedures therefore were created the same day in 1967. Although it is not stated in Rule 39 and does not need to be stated, the co-extensive life since July 1, 1967 of the intermediate appellate court in criminal cases and the state post-conviction procedures is another logical reason that the Tennessee Supreme Court directed that Rule 39 shall apply, beginning on July 1, 1967.

> *State as to the meaning of its own law. Stringer v. Black*, 503 U.S. 222, 235, 112 S.Ct. 1130, 1139 (1992).

In *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S.Ct. 1728 (1999), the Court's majority opinion found that the federal exhaustion requirement did require presentation in state court of claims in a discretionary appeal. The rule of the majority, however, was based on notions of comity, i.e., deference by the federal courts to the review by state courts of state court convictions. The majority, therefore, observed:

> We acknowledge that the rule we announce today – requiring state prisoners to file petitions for discretionary review when that review is part of the ordinary appellate review procedure in the State – has the potential to increase the number of filings in state supreme courts. We also recognize that this increased burden may be unwelcome in some state courts because the courts do not wish to have the opportunity to review constitutional claims before those claims are presented to a federal habeas court. (Citations to South Carolina and Arizona supreme court rulings that decided not to require the presentation of claims in order to satisfy federal exhaustion omitted). Under these circumstances, O'Sullivan may be correct that the increased, unwelcome burden on state supreme courts disserves the comity interests underlying the exhaustion doctrine.

119 S.Ct. at 1733-34. Justice Stevens' dissenting opinion, joined by Justices Ginsburg and Breyer, noted that the imposition of the exhaustion requirement on discretionary state court appeals "will impose unnecessary burdens on habeas petitioners; it will delay the completion of litigation that is already more protracted than it should be; and most

ironically, it will undermine federalism by thwarting the interests of those state supreme courts that administer discretionary dockets." *Id.* at 1739.

Justices Stevens, Ginsburg, and Breyer pointed out that the majority "leaves open the possibility that the state supreme courts may avoid a deluge of undesirable claims by making a plain statement – as Arizona and South Carolina have done – that they do not wish the opportunity to review such claims before they pass into the federal system." *Id.* at 1740. These justices "agree[d] with Justice Souter [in his concurring opinion]. . . that a proper conception of comity obviously requires deference to such a policy," *Id.*. These Justices concluded: "The key point is that federal courts should not find procedural default when a prisoner has relied on a state supreme court's explicit statement that criminal defendants need not present to it every claim that they might wish to assert as a ground for relief in federal habeas proceedings." *Id.* at 1741. There would be no default so long as the state court has taken the "step of expressly disavowing any desire to be presented with every such claim." *Id.*

Thus, in *O'Sullivan*, the Court created "a kind of presumption that a habeas petitioner must raise a given claim in a petition for discretionary review in state court prior to raising that claim on federal habeas but the State could rebut the presumption through state law by clearly expressing a desire to the contrary." *Id.*, at 1741-42. Indeed, the Supreme Court mentioned South Carolina and Arizona as examples of states which, based upon statements from their respective supreme courts, might express "contrary preferences." *Id.*, at 1741-42. *See, also*, the majority opinion, 119 S.Ct. at 1734, which cites and relies upon the statements by the Supreme Courts of South Carolina and Arizona, which did not require litigants to raise claims in discretionary appeals in order to satisfy federal exhaustion.

The Arizona rule is very similar to Tennessee Supreme Court Rule 39 in pertinent part. The Ninth Circuit Court of Appeals was confronted with the Arizona rule in *Swoopes v. Sublett*, 196 F.3d 1008 (9th Cir. 1999), and recognized that the majority in *O'Sullivan* "acknowledged an exception relating to 'any specific state remedy when a State has provided that that remedy is unavailable.'" 196 F.3d at 1009. The remedy need not be exhausted "so long as the state has identified the procedure as outside the standard review process and has plainly said that it need not be sought for the purpose of exhaustion." *Id.* at 1009-10, citing *O'Sullivan*, 119 S.Ct. at 1735 (Souter, J., concurring). The Ninth Circuit concluded:

> In sum, the Arizona Supreme Court has announced that . . . review need not be sought before the Arizona Supreme Court in order to exhaust state remedies. Thus post-conviction review before the Arizona Supreme Court is a remedy that is 'unavailable' within the meaning of *O'Sullivan*. . . . Recognizing that 'each state is entitled to formulate its own system of post-conviction relief, and ought to be able to administer that system free of federal interference, *see Nino v. Galaza*, 183 F.3d 1003, 1007 (9th Cir. 1999), we must credit Arizona's choice.

196 F.3d at 1010.

In addition, the Pennsylvania Supreme Court issued a *per curiam* order establishing a rule similar to Rule 39. *See, In Re: Exhaustion Of State Remedies In Criminal And Post-Conviction Relief Cases*, No. 218 Judicial Administration Docket No. 1 (hereinafter: Order No. 218). Order No. 218 is quoted and construed in *Balsi v. Attorney General of the Commonwealth of Pennsylvania*, 120 F.Supp.2d 451 (M.D.Penn. 2000). The *Balsi* court held:

> [W]e believe that we are bound to hold, and we do hold, that the order of the Supreme Court of Pennsylvania waives the exhaustion doctrine insofar as the doctrine requires a

> petitioner under § 2254 to present claims to the Supreme Court of Pennsylvania in a petition for allocatur prior to presenting them in federal court.[4]

In a later case, *Mattis v. Vaughn*, 128 F.Supp.2d 249, 255 n. 6 (E.D.Pa. 2001), another federal court from a different Pennsylvania district agreed. In *Mattis*, the court held:

> We hold therefore that Order No. 218 of the Pennsylvania Supreme Court has made such review 'unavailable' in Pennsylvania. . . . We agree also with the concurring and dissenting Justices in *O'Sullivan* that the interests of comity would be greatly disserved by ignoring the pronouncements of state supreme courts that they see no need for prisoners to petition them for discretionary review before the prisoners can seek federal habeas corpus relief.

128 F.Supp.2d at 259.

D. Rule 60(b) provides the authority and the procedural vehicle for this Court to address the issues presented in this motion.

As has been demonstrated, the United States Supreme Court has recognized the authority of states to set their own exhaustion rules. The Tennessee Supreme Court promulgated Rule 39 consistent with the state court rules contemplated in *O'Sullivan*, thereby highlighting this Court's misinterpretation of Tennessee's requirements for federal exhaustion. *See*, Rule 39. Because this Court denied relief based on an alleged procedural default that did not exist in Tennessee, this Court may grant relief from judgment under Rule 60(b), order further proceedings, and ultimately review

[4] The *Balsi* court so ruled ignoring the fact that "it would seem odd that a state court might dictate to a federal court the interpretation of a federal statute," i.e., the federal habeas exhaustion requirement. *See*, 120 F.Supp.2d at 465.

the merits of relevant claims. Rule 60(b) is the appropriate vehicle for correcting this Court's earlier error.

F. R. C. P. 60 provides relief from:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: .... (6) any other reason justifying relief from the operation of the judgment.

Rule 60(b) relief is properly obtained by motion in the court that rendered judgment. This Rule 60(b) motion is timely filed. It is based on the recent clarification of pre-existing law, i.e., Tenn. Sup. Ct. R. 39, promulgated on June 28, 2001. When Rule 39 was promulgated on June 28, 2001, this case was pending before the United States Supreme Court on a Petition for a Writ of Certiorari. That Petition was denied on October 9, 2001, a ruling that was issued without prior notice. Petitioner placed this Court on notice on October 10, 2001 of his intent to submit this motion. This motion is made based on the extraordinary circumstances herein described, and is a proper vehicle for the relief sought as set out in this motion and memorandum. Generally, *see*, 11 Wright & Miller, *Federal Practice and Procedure* (2d Ed., 1995) §§ 2851-2880.

"[Rule 60(b)(6)] vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 615, 69 S.Ct. 384, 390 (1949). "Amended 609b) provides for setting aside a judgment for any one of five specified reasons or for any other reason justifying relief from the operation of the judgment. "*Id.*, 69

S.Ct. at 389.[5] Although a one year limitation on filing Rule 60(b) motions generally applies, it does not apply "under the `other reason' clause of 60(b)." *Id.* at 390.

Rule 60(b) "gives the courts a 'grand reservoir of equitable power to do justice in a particular case.'" *Pierce v. Cook Co.*, 518 F.2d 720, 722 (10th Cir. 1975), *cert. denied*, 423 U.S. 1079 (1976). The Sixth Circuit has held that "Rule 60(b) is appropriate to accomplish justice in an extraordinary situation and is addressed to the sound discretion of the court." *Overbee v. Van Waters & Rogers*, 765 F.2d 578, 580 (6th Cir. 1985). The fact that Petitioner's life is at stake, in and of itself, is an extraordinary circumstance, sufficient to require this Court to exercise its discretionary authority pursuant to Rule 60(b).

A Rule 60(b) motion is particularly appropriate in this case because of the unique characteristics of 28 U.S.C. § 2254 federal habeas cases. In *Matarese v. Lefevre*, 801 F.2d 98, 106 (2d. Cir. 1986), *cert. denied*, 480 U.S. 908 (1987), the Second Circuit held that finality as a limitation to the application of a Rule 60(b) motion in some cases has little relevance in the habeas context. The Second Circuit held that it is "particularly appropriate; for the District Court to

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[5] In *Schmitt v. American Family Mutual Insurance Company*, 187 F.R.D. 568 (S.D. Ind. 1999), the District Court held:

> Rule 60(b) of the Federal Rules of Civil Procedure authorizes relief from a court's judgment or order based on a variety of grounds, including mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud or misconduct by the opposing party, lack of jurisdiction of the issuing; court, or prior satisfaction or release of the judgment. Rule 60(b)(6) adds a residual category authorizing relief for "any other reason justifying relief from the operation of the judgment." Rule 60 (b)(6) may be used to order relief from judgment only where "extraordinary circumstances" exist or where the judgment may cause "extreme and undue hardship."

Schmitt, 187 F.R.D. at 571.

entertain a Rule 60(b)(6) motion on the grounds of a retroactive change in the law in the context of a habeas corpus proceeding in which `conventional notions of finality have no place.'" *Matarese*, 801 F.2d at 106. "[T]he importance of the underlying action, petitioner's first and only application for a writ of habeas corpus, militates toward a grant of reconsideration." *Liberatore v. Mcguiness*,1998 U.S. Lexis 22842 (S.D.N.Y. 1998) (granting 60(b)(6) motion in habeas case to allow consideration of claims on the merits); *Hall v. Alabama*, 700 F.2d 1333 (11th Cir. 1983) (court entertained Rule 60(b) motion in habeas corpus proceeding).

The District Court in *Schmitt*, 187 F.R.D. at 573, held that when the interest in finality is "minimal to nonexistent" a change in state decisional law may constitute an extraordinary circumstance warranting Rule 60 (b) relief. If relief is granted pursuant to this Rule 60(b) motion, less of a hardship would obviously accrue to Respondent than would accrue to Petitioner, should it not be granted. A grant of relief would cause Respondent to *suffer* "minimal hardship," *Id.*, at 575. *See, also, Matarese v. LeFevre, supra*, 801 F.2d at 106 (relief should be granted "where the judgment may work an extreme and undue hardship"). In fact, a, grant of relief would cause Respondent no hardship at all. It would merely prevent the state from executing an unconstitutional judgment - something in which it has absolutely no interest. On the other hand, "[t]he hardship that [Petitioner] would suffer without relief from judgment is clear," *Schmitt, supra*, 187 F.R.D. at 576. Upon a denial of relief, Petitioner's hardship is that he would lose his life. "In order to prevent the working of extreme and undue hardship upon plaintiff, to accomplish substantial justice and to act with appropriate regard for the principles of federalism which underlie our dual judicial system in this extraordinary case," *DeWeerth v. Baldinger*, 804 F.Supp. 539, 551 (S.D.N.Y. 192), therefore, Petitioner is entitled to Rule 60(b) relief.

Changes in state and federal[6] law have frequently warranted Rule 60(b) relief in federal court. Examples in which changes in state law warranted relief in federal court include: *Overbee v. Van Waters*, 765 F.2d 578 (6th Cir. 1985) (relief in federal court after state supreme court reversed itself); *Cincinnati Insurance Co. v. Byers*, 151 F.3d 574 (6th. Cir. 1998) (same) *Schmitt, supra* (same); *Heirs-at-Law & Beneficiaries v. Dresser Industries*, 158 F.R.D. 89 (D.Miss. 1993) (same); *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975) (en banc decision that Rule 60(b)(6) relief was appropriate to ensure justice after state supreme court established that federal court misunderstood state law); *DeWeerth v. Baldinger, supra*, 804 F.Supp. at 541 (S.D.N.Y. 1992) ("Because of the primacy of the state courts in determining interpretation of state law under principles of federalism," an intervening action by a state supreme court "is a new development justifying Rule 60 relief."); *First American Bank v. Bonded Elevator Inc.*, 1986 U.S.Dist.Lexis 22885 (W.D.Ky. 1986) (relief from judgment ordered where Kentucky state court rendered decision adverse to prior federal ruling); *Sargent v. Columbia Forest Prod. Inc.*, 75 F.3d 86, 139 (2d Cir. 1996) (mandate recalled where intervening state court decision inconsistent with prior federal judgment); and *In Re Calano*, 2000 U.S.Dist.Lexis 1549 (E.D.La. 2000) (Rule 60(b) granted given intervening state statute).

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[6] Examples in which changes in federal law warranted relief in federal court: *Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 702 (10th Cir. 1989) (change in relevant case law by United States Supreme Court warranted relief pursuant to Rule 60(b)(6)); *McGrath v. Potash*, 199 F.2d 166 (D.C.Cir. 1952) (intervening Congressional statute mandated relief from judgment under 60(b)(6)); *Manhattan Cable Television Inc. v. Cable Doctor*, 824 F.Supp. 34 (S.D.N.Y. 1993) (relief from judgment under 60(b)(6)); *Manhattan Cable Television Inc. v. Cable Doctor*, 824 F.Supp. 34 (S.D.N.Y 1993) (relief from judgment granted in light of new federal legislation).

In the present case, there is not even a change in state law. Rule 39 merely memorializes what has been the law in Tennessee since 1967 gives this Court the opportunity to correct the mistake made in its 1998 decision. The United States Supreme Court's decision in *O'Sullivan v. Boerckel*, the Tennessee Supreme Court through the promulgation of new Rule 39, and the application of old Rule 11 make this a classic case in which a relief from judgment should be sought with this Court pursuant to a Rule 60(b)(6).

E. This Rule 60(b) motion is not a second or successive habeas corpus petition because it raises no new claims, no new facts, and does not rely on new law.

Because it does not raise any new claims, this Rule 60(b) motion should not be treated by this Court as a second or successive habeas corpus petition. In *Rodriguez v. Mitchell*, 252 F.3d 191, 199 (2nd Cir. 2001), the Court found:

> A Motion under Rule 60(b) to vacate a judgment denying habeas is not a second or successive habeas petition and should therefore be treated as any other motion under Rule 60(b).

Id., 252 F.3d at 198. *See, also, e.g., Ritter v. Smith*, 811 F.2d 1398 (11th Cir.1987) (following grant of habeas relief which became final, granting state's motion for relief from judgment based upon intervening United States Supreme Court decision calling into question validity of district court's initial grant of writ); *Scott v. Sin lea tare*, 870 F. Supp. 328 (S.D.Fla. 1994). The Court in *Rodriguez* also stated:

> [T]he procedural object of the motion authorized by Rule 60(b) is simply to vacate the federal judgment dismissing the habeas petition, not to vacate the state conviction. The fact that the court to which the motion is addressed might conceivably go farther and grant the habeas in

> response to the motion does not in our view make such a motion second habeas petition. The same would be true if, in the course of litigating the habeas, the petitioner moved for summary adjudication of his claim, or moved to quash the respondent's asserted defenses. In ruling on the motion in petitioner's favor, the court might go so far as to grant habeas, ruling that the conviction be vacated. It does not follow that such a motion should be considered a second petition.

Id.

This Rule 60(b) motion is unlike the Rule 60(b) relief sought in *McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir.1 996), in which "approximately sixty additional issues [had been] raised by McQueen." *Id.* at 1334. Petitioner McQueen was "advancing new claims never included in the initial petition," *Id.* at 1335, and, thus, the Rule 60(b) motion in that case was, in fact, "the practical equivalent of a successive habeas corpus petition." *Id.*

In this matter, unlike the case in *McQueen*, Petitioner is raising no new claims. Moreover, Petitioner is presenting no new facts in support of the claims identified in his Rule 60 motion. All of the facts supporting these claims are established by the proof introduced in this Court's 1998 evidentiary hearing when Petitioner was presenting these very same claims. Nor is the Petitioner relying on new law under Tenn.S.Ct.Rule 39, which only memorializes pre-existing law that this Court previously misapplied.

F. This Court has the jurisdiction to entertain this Rule 60(b) motion, given the procedural status of this case.

This Court's jurisdiction to entertain the Rule 60(b) motion is clear, regardless of the current procedural status of this case. In *Herring v. Kennedy-Herring Hardware Co., Inc.*, 261 F.2d 202 (6th Cir. 1958), the Sixth Circuit Court of Appeals stated:

> The authority to grant a new trial under Rule 59(a) or to relieve a party from a final judgment under Rule 60(b), rules of Civil Procedure, rests with the District Court, not the Court of Appeals. In accordance with the procedure in an analogous situation, approved in *Smith v. Pollin*, 90 U.S.App.D.C. 178, 194 F.2d 349; see also: *Metcalf v. Untied States*, 6 Cir., 195 F.2d 213, 218; *Hamel v. United States*, 6 Cir., 135 F. 2d 969; appellant's motion seeking a new trial or relief from final judgment under either of those rules should be addressed to the District Court.

261 F. 2d at 203.

Petitioner, therefore, may bring his Rule 60(b) motion to the attention of the District Court when it is ripe, notwithstanding the pendency of an appeal in the case. On a habeas corpus petition challenging a state court conviction, the Court in *Browder v. Dir., Dept. of Corrections of Illinois*, 98 S.Ct. 556 (1978), recognized that a motion for relief from judgment is appropriate even after the district court has lost jurisdiction to grant relief on the petition. In *Cochran v. Birkel*, 651 F.2d 1219, 1221 (6th Cir. 1991), the Sixth Circuit stated that it "has consistently held that a district court retains jurisdiction to proceed with matters that are in aid of the appeal."

> The district court is the proper forum to determine in the first instance whether there is sufficient basis to overturn the judgments." Furthermore, litigants who seek Rule 60(b) relief typically cannot wait until an appeal has been concluded to request such relief because the period during which the case is on appeal counts toward determining whether a Rule 60(b) motion is timely filed. For this reason, as the parties agree, litigants must be permitted to

file these motions in the district court even while an appeal is pending.

Fobian v. Storage Technology Corp., 164 F.3d 887, 889 (4th Cir.1999)(internal citations omitted). In *First Nat'l Bank Salem, Ohio v Hirsch*, 535 F.2d 343 (6th Cir. 1976), the Sixth Circuit panel stated: "If the district judge is disposed to grant the motion, he may enter an order so indicating and the party may then file a motion to remand" in the Sixth Circuit Court of Appeals if an appeal is pending. *Id.*, 535 F.2d at 346. *See*, also, *Smith v. Lujan*, 588 F.2d 1304, 1307 (9th Cir. 1979); *Carriger v. Lewis*, 971 F.2d 329, 332 (9th Cir. 1992).

In accordance with the foregoing authorities, therefore, Petitioner is requesting this Court to make an initial determination concerning its inclination to hear Petitioner's Rule 60 motion. If this Court elects to hear the motion, it could notify Petitioner and Petitioner will move the Sixth Circuit Court of Appeals to remand the case to this Court to decide the motion. Further, if the record has been filed in the Court of Appeals and this Court needs the record in order to rule on the Rule 60(b) motion, "the district court may certify an order to the court of appeals requesting that the district court record be returned so that the Rule 60(b) motion may be decided. *See, e.g., Kelley v. Metropolitan City Board of* Education of Nashville, Tenn., 463 F.2d 732, 745 n. 3 (6th Cir. 1972), cert. denied 409 U.S. 1001, 93 S.Ct. 322, 34 L.Ed.2d 262 (1972)." *First Nat'l Bank Salem, Ohio, supra*, 535 F.2d at 346 n. 2.

III. The applicable legal standards for prosecutorial misconduct and ineffective assistance of counsel

> *The prosecutor must act as "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but*

> *that justice shall be done. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. Judge v. State*, 539 .W.2d 340, 344 (Tenn. Crim. Ap. 1976) (quoting *Berger v. United States*, 295 U.S. at 88.).
>
> *He is to judge between the people and the government; he is to be the safeguard of the one and the advocate for the rights of the other; he ought not to suffer the innocent to be oppressed or vexatiously harassed, anymore than those who deserve prosecution to escape; he is to pursue guilt; he is to protect innocence. . . . Fout v. State*, 4 Tenn. 98, 99 (1816)[7]

A. The standards for measuring prosecutorial misconduct and ineffective assistance of counsel are the same.

The same legal standard applies to measure both the materiality resulting from prosecutorial misconduct and the prejudice resulting from the ineffectiveness of counsel. As this Court has noted, the applicable standard for both general categories of constitutional violations is: "a reasonable probability that . . . the result of the proceeding would have been different," but for the misconduct of the prosecutor, *see Abdur'Rahman v. Bell*, 999 F.Supp. 1073, 1088 (M.D.Tenn. 1998), and the failures of counsel, *see Id.*, at 1092. *See, also, Kyles v. Whitley*, 115 S.Ct. 1555, 1565 (1995) (application of the above-quoted standard as the test for materiality for *Brady*

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[7] This quote from *Fout v. State* introduces the "Death Penalty Guidelines," issued October 18, 2001 by the Office of the District Attorney General of the 20th Judicial District, the same office that employs ADA John Zimmermann, who prosecuted this case. *See*, Appendix C.

claims); *Strickland v. Washington*, 104 S.Ct. 2052, 2068 (1984) (application of the standard for the test of materiality in prosecutorial misconduct claims is the same standard as the test for prejudice resulting from ineffective assistance of counsel)[8]. As this Court has noted, a probability is "reasonable" if it "undermines confidence in the outcome," whether with reference to claims of prosecutorial misconduct, *Abdur'Rahman*, *supra*, 999 F.Supp. at 1090, or claims of ineffective assistance of counsel, *Id.* at 1092.

B. The *Brady* and *Strickland* tests do not require Petitioner to demonstrate that, but for the errors, the outcome of the trial would have been different.

The test is not an outcome determinative test. Petitioner is only required to demonstrate that doubt is cast on the result of the trial so that it undermines confidence in its outcome because of the errors. As the Sixth Circuit has recognized:

> [T]he "question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." [*Kyles v. Whitley*], at 434, 115 S.Ct. 1555; *Frost*, 125 F.3d at 382-83 (6th Cir. 1997). Nor does the defendant need to "demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Kyles*, 514 U.S. at 434-35, 115 S.Ct. 1555; *United States v. Smith*, 77 F.3d 511, 515 (D.C.Cir. 1996) (materiality requirement is not a sufficiency-of-the-evidence test.)

Schledwitz v. United States, 169 F.3d 1003, 1012 (6th Cir. 1999).

C. *Brady* and *Strickland* errors are to be considered collectively or cumulatively and the ultimate question is whether the trial was rendered unfair by the cumulation of error.

> *We consider the cumulative effect of multiple trial errors in determining whether relief is warranted. Phillips v. Woodford*, 2001 WL 1230674, 9th Cir. No. 98-99022, filed October 15, 2001, at 15.

Whether ineffective assistance of counsel, prosecutorial misconduct, or both are under review, the fundamental question is whether the trial was fair; and whether errors committed during the course of the trial, considered together, rendered the trial unfair. The United States Supreme Court noted in *Strickland v. Washington*, *supra*, 466 U.S. at 696, that "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged;" and in *United States v. Bagley*, 473 U.S. 667, 674-75 (1985), a progeny of *Brady*, the Court stated: "'A fair analysis of the holding in Brady indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.' (quoting *United States v. Agurs*, 427 U.S. 97, 104, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)."

In order to judge the fairness of the trial and the reliability of its outcome, it is incumbent on the reviewing court to consider the cumulative effect of multiple errors committed in the trial. In *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992), the Court stated:

> We do not need to decide whether these deficiencies alone meet the prejudice standard because other significant errors occurred that,

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[8] The Court in *Strickland* specifically recognized that "the appropriate test for prejudice finds its roots in the test for materiality if exculpatory information not disclosed to the defense by the prosecution, *United States v. Agurs*, 96 S.Ct. 2392, 2397 (1976) . . . ." *Strickland*, *supra*, 104 S.Ct. at 2068.

> considered cumulatively, compel affirmance of the district court's grant of habeas corpus as to the sentence of death. *See United States v. Tucker*, 716 F.2d 576, 595 (9th Cir. 1983) ("a court may find unfairness -- and thus prejudice -- from the totality of counsel's errors and omissions"); *Ewing v. Williams*, 596 F.2d 391, 395 (9th Cir. 1979)("prejudice may result from the cumulative impact of multiple deficiencies", quoting *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 793 (1979).

Id. at 622. In *Gonzales v. McKune*, 247 F.3d 1066, 1078 (10th Cir. 2001), the Court found that the outcome of the trial "would likely have changed in light of a combination of *Strickland* and *Brady* errors, even though neither test would individually support a petitioner's claim for habeas relief." In that case, the Court also stated: "[B]oth tests[*Strickland* and *Brady*] were established to preserve the integrity of the process, and they adopt similar standards to reach this goal." *Id.*, 247 F.3d at 1078. *See also Phillips v. Woodford*, 2001 WL 1230674, 9th Cir. No. 98-99022, filed October 15, 2001, at 15-16 (Court cumulated prejudice as a result of ineffective assistance of counsel with the materiality resulting from *Brady*-like claim, i.e. prosecution allowed its witness to falsely testify that he had no deals.).

The Sixth Circuit Court of Appeals has recognized that "a reviewing court is to consider the collective effect" of the errors. *Schledwitz*, *supra*, 169 F.3d at 1088. Relying on the United States Supreme Court's ruling in *Kyles v. Whitley*, *supra*, the Sixth Circuit Court of Appeals stated in *Schledwitz*:

> [I]n determining whether undisclosed evidence is material, the suppressed evidence is considered collectively, rather than item-by-item, to determine if the "reasonable

> probability" test is met." *Kyles*, 514 U.S. at 436, 115 S.Ct. 1555; *Frost*, 125 F.3d at 383.

169 F.3d at 1012.

This approach reflects the common sense reality that the jury's verdicts at guilt and sentencing were the product of the total body of evidence presented to them and not merely isolated parts of that body of evidence. It is incumbent on the reviewing court "to consider the collective effect," *Id.*, of the various errors in its determination of whether the errors "undermine[] confidence in the outcome," *Id.*, *Abdur'Rahman v. Bell*, 999 F.Supp. at 1090.

D. Particularly because the prosecution intentionally deceived the court and jury, a new trial is required.

> *[D]eliberate deception of a court and jurors by the presentation of known false evidence cannot be reconciled with the rudimentary demands of justice. Mooney v. Holohan*, 55 S.Ct. 340 (1935).

The Due Process Clause of the Fourteenth Amendment prohibits a conviction obtained through the use of false evidence. *See, e.g., Pyle v. Kansas*, 63 S.Ct. 177 (1942); *Napue v. Illinois*, 79 S.Ct. 1173 (1959). The same is true for a conviction obtained when the prosecution solicits false evidence and allows it to go uncorrected when it appears. *See, e.g., Alcorta v. State of Texas*, 78 S.Ct. 103 (1957); *Napue*, 79 S.Ct. at 1177. "The principle that a State may not use false evidence, including false testimony, to obtain a tainted conviction, [is] implicit in any concept of ordered liberty." *Id.*

> Indeed, if it is established that the government knowingly permitted the introduction of false testimony, reversal is "virtually automatic." *United States v. Stofsky*, 527 F.2d 237, 243 (2nd Cir. 1975) (citing *Napue v. Illinois*, citation omitted).

United States v. Wallach, 935 F.2d 445, 456 (2nd Cir. 1991).

The prosecutor has an obligation to refrain from intentional deception, an obligation higher even than his obligation to provide exculpatory evidence in compliance with *Brady*. This obligation to refrain from intentional deception applies to intentional misrepresentations as well as the presentation of false testimony. In *United States v. Valentine*, 830 F.2d 565 (2nd Cir. 1987), the Court specifically found that the prosecution had violated "the due process prohibition against a prosecutor's making 'knowing use of false evidence', including by misrepresenting the nature of nontestimonial evidence." 830 F.2d at 570-71. The Court stated:

> In analyzing severity [of prosecutorial misconduct], among the elements to consider is the "extent to which the misconduct was intentional". *Id.* [i.e. *United States v. Mordica*, 663 F.2d 1173, 1181 (2nd Cir. 1981) per curiam] *See United States v. Universita*, 298 F.2d 365, 367 (2nd Cir.) ("The prosecutor has a special duty not to mislead; the government should, of course, never make affirmative statements contrary to what it knows to be the truth.")

Id. at 570. In *Davis v. Zant*, 36 F.3d 1538 (11th cir. 1994), the Court stated:

> [T]he prosecutor's misrepresentations were deliberately placed before the jury. In this particular case, the clearly intentional nature of the misrepresentations weighs heavily in favor of [the habeas Petitioner]; such as a patently dishonest argument brings this case close to the more traditionally established forms of misconduct such as the proscription against a prosecutor's knowing use of false testimony (citations omitted), or the knowing use of false evidence. *See, Brooks*, 762 F.2d at 1402, n. 26 ("... [T]here may be cases where the prosecutor's intentional conduct rises to a level equivalent to a knowing use of false evidence.")

36 F. 3d at 1550.[9]

The standard imposed on the prosecution is greater and a conviction thereby obtained is more likely reversed when the prosecution knowingly and intentionally deceives the court. As established by the United States Supreme Court, the proper standard to apply is as follows:

> [A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.

Kyles, supra, 115 S.Ct. at 1565 n. 7 (1995); *United States v. Bagley*, 473 U.S. 667, 679 n. 9 (1985); *United States v. Agurs*, 96 S.Ct. 2392, 2397 (1976); *United States v. O'Dell*, 805 F.2d 637, 641 (6th Cir. 1986); *Brown v. Wainwright*, 785 F.2d 1457, 1463 (11th Cir. 1986). If the prosecutor intentionally misrepresents to the extent that Zimmermann did in this case, it is not necessary for Petitioner to show that there was "a reasonable **probability** that the outcome **would have been different**," as it would be if the prosecutor committed a *Brady* violation by withholding evidence. Petitioner must

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[9] Prosecutorial misconduct is also less acceptable under the Constitution when it is aimed at the core of the defense's case. See, e.g., *United States v. Harp*, 536 F.2d 601 (5th Cir. 1976) (A prosecutor's comment during closing argument regarding defendant's post-arrest silence would not be harmless error because it struck at the jugular of the defense.) relied on in *Davis v. Zant, supra*, 36 F.3d at 1550 n. 17.

only show that there is a **possibility**[10] that the outcome **could have been affected** when the prosecutor intentionally misrepresents.

E. *Brady* and *Strickland* claims are subject to *de novo* review; and, since Petitioner seeks no finding of purely historical fact in support of these claims that is inconsistent with state court findings, the § 2254(b) "presumption of correctness" does not apply.

"[W]hether Petitioner received effective assistance of counsel is a mixed question of fact and law, which is reviewed de novo." *Strickland v. Washington*, *supra,* 104 S.Ct. at 2070; *Abur'Rahman v. Bell*, *supra,* 999 F.Supp. at 1092. Allegations of prosecutorial misconduct are mixed questions of law and fact and are thus, also, reviewed by this Court *de novo*. *See*, *e.g.*, *Jones v. Gibson*, 206 F.3d 946, 958 (10th Cir. 2000). Since allegations of both ineffective assistant of counsel and prosecutorial misconduct involve mixed questions of law and fact, the § 2254(d) "presumption of correctness" that attaches to state court findings of purely historical fact, does not apply to the questions raised by this motion. *See*, *e.g.*, *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764 (1981).

Further, Petitioner does not even seek any finding of fact regarding ineffective assistance of counsel and prosecutorial misconduct claims that is inconsistent with state court findings of fact. As the Sixth Circuit Court of Appeals found in this case, Petitioner seeks no factual findings by this Court with regard to the ineffective assistance of counsel claims that is inconsistent with or contradictory to any state court finding of fact, including purely historical facts. *See*, *Abdur'Rahman v. Bell*, *supra*, 226 F.3d at 708. Petitioner has been unable to find any state court findings of purely historical fact with

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[10] The word "possibility" is used here in the same sense that "any reasonable likelihood" was used in the above-cited quote from *Kyles*, *supra*, 115 S.Ct. at 1565 n. 7.

regard to claims of prosecutorial misconduct. In any event, Petitioner seeks of this Court no factual finding that is contradictory with any state court finding of fact with regard to prosecutorial misconduct or ineffective assistance of counsel.

For the reasons set out above, this court is free to conduct a *de novo* review of the law of ineffective assistance of counsel and prosecutorial misconduct as applied to the facts presented to this court in support of those claims.

IV. Petitioner's Properly Presented and Exhausted Claims of Prosecutorial Misconduct

As this Court previously found, this is a case where "abundant" and "compelling" evidence was never investigated by Petitioner's trial counsel and therefore never presented to the jury. But when all of Petitioner's claims are viewed cumulatively and in context, the unfairness of the trial and the unreliability of the outcome are even more appalling. The instances of prosecutorial misconduct in this case, when considered in their totality, establish more than just the withholding of significant and compelling evidence, and even more than individual instances of intentional prosecutorial deception. They establish a deliberate pattern and scheme of prosecutorial fraud from indictment to sentencing, with regard to both the 1986 offense for which Petitioner was tried in this case and the prior 1972 offense which served as the most important aggravator relied upon by the prosecution in seeking the death penalty. As explained below, this persistent and deceptive scheme of prosecutorial misconduct did more than to keep the jury from hearing all the evidence; the ultimate effect was to portray an entirely false and misleading picture of every important aspect of this case.

A. The Context of the Prosecutorial Misconduct in this Case.

The prosecutorial misconduct in this case was perpetrated primarily by Assistant District Attorney John Zimmermann, a prosecutor with a long history of engaging in various forms of

misconduct and deceptive practices.[11]

Zimmermann knew that obtaining a death sentence in this case would be problematic. He testified before this Court that in any capital case the prosecution must "explain everything to the jury." (FT 905). Zimmermann also perceived that in Davidson County, at least, capital jurors must be convinced "not beyond a reasonable doubt, but beyond a shadow of a doubt" if they are to impose a sentence of death. (FT 905-908).

Further, Zimmermann knew that this case presented its own specific problems that would make it particularly difficult to obtain a death sentence. In a memo to Assistant District Attorney Eddie Barnard (FEx. 42), and in his testimony in this Court (FT 908-09, 912-13), Zimmermann specifically identified some of the weaknesses in the prosecution's case, such as the following: (i) no one other than co-defendant Devalle Miller could identify Petitioner as the assailant; (ii) because only Miller could identify Petitioner as the assailant, it would be necessary to cut a deal with Miller in exchange for his testimony;[12] and, (iii) although "photographs of the decedent's house show blood spattering all over the kitchen ... [if Petitioner] did wear his coat the entire time he obviously was not present when the stabbing occurred." (FEx 42 at Bates stamp pp. 000677-8).[13]

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[11] Attached hereto as Appendix D is a memorandum describing instances in which courts in other cases have reprimanded Zimmermann for engaging in many of the same kinds of prosecutorial misconduct that occurred in Petitioner's case.

[12] It should be noted that pursuant to the recently issued policy of the Davidson County District Attorney General, "The death penalty will not be sought in cases where the evidence consists of the uncorroborated testimony of a single eyewitness or of a cooperating codefendant or accomplice." *See, Office of the District Attorney General, 20th Judicial District, Death Penalty Guidelines*, ¶ 9 (attached as Appendix C hereto) (emphasis added).

[13] *See, also*, Evidence That Petitioner Was Not The Assailant, Appendix E hereto.

Zimmermann acknowledged in his memo that, "The case is not open and shut on the issue of guilt." (*Id.* at p. 000681). In this same memo and in other documents in his file, Zimmermann also was aware that Petitioner had potential mental state defenses that could be raised at both the guilt and sentencing stages of the case. (*Id.* at 000678-81).

Because of these and other problems with the case, Zimmermann violated his ethical and legal obligations to present the truth. He withheld key information and he invented his own facts to suit what he considered to be a winning theory for the prosecution.

B. The Types of Prosecutorial Misconduct in this Case.

The properly exhausted and presented prosecutorial misconduct claims in this case can be divided into four general categories: (i) pretrial misrepresentations; (ii) *Brady* violations; (iii) improper manipulation of key witness testimony; and (iv) deceptive presentation of inadmissible evidence.

(i) Pretrial Misrepresentations.

(a) MTMHI Letter. (Claim D.2.(2))

The first set of prosecutorial pretrial misrepresentations can be found in Zimmermann's February 10, 1987 letter to Middle Tennessee Mental Health Institute ("MTMHI") in connection with its psychological evaluation of Petitioner. (FEx. 34). At the time, Petitioner was not being represented by any attorney: his first attorney, Neal McAlpin, had effectively withdrawn from the case and his trial attorney, Lionel Barrett, had deliberately refrained from working on the case while awaiting the $10,000 balance of the promised retainer which he never received. (FT 694-5). Zimmermann's letter, therefore, was MTMHI's only outside source of information about Petitioner's prior criminal history and the circumstances surrounding the offense, and it was filled with fabrications.

First, with regard to the Petitioner's prior murder

conviction, the letter states:

> During those proceedings, and according to Court records, the defendant, through his counsel, moved the Court for a competency hearing and psychiatric evaluation as to his sanity. After those examinations were concluded the Court ruled that the defendant was competent and the Court directed the defendant to proceed to trial. There appears to be no evidence from the records submitted to us in that proceeding that the defendant relied upon an insanity defense at trial.

(FEx. 34, p. 3). This was a deliberate falsehood. According to the transcript of the 1972 trial, which was in the prosecution's file, the Petitioner did rely on the insanity defense. (FEx. 131). Indeed, as reflected in this transcript, at the 1972 trial Petitioner presented expert psychiatric testimony that he was insane, and the government's own psychiatric expert conceded that he could not be sure that Petitioner was able to control his behavior at the time of that offense.[14] Even Zimmermann's internal memorandum to Assistant District Attorney Eddie Bernard referred to the fact that Petitioner raised an insanity defense at his 1972 trial. (FEx. 42 at Bates stamp p.000679).

Second, the letter states that Petitioner "was not associated with [] particular religious organization." (*Id.* at p. 3). That was not true, for Petitioner was associated with the Southeaster Gospel Ministry (the "SGM"), a religiously oriented organization. It is not clear what Zimmermann knew about the SGM at the time he wrote the letter, but there is

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[14] Under the Tennessee definition of insanity at the time, the testimony given by both psychiatrists in Petitioner's 1972 trial would have supported an insanity defense. *See Graham v. State*, 547 S.W.2d 531 (Tenn. 1977) (Tennessee definition of insanity); *State v. Clayton*, 656 S.W.2d 344, 346 (Tenn. 1983) (burden of proof is on the state to prove sanity beyond a reasonable doubt).

nothing in the prosecution's file that would support this statement. Zimmermann ultimately learned from Devalle Miller about the involvement of the SGM, but he never gave any of that information to the defense or MTMHI. (P-CT, Vol. III, pp. 13-43, discussed below).

Third, the letter states: "The police theorize that the defendant was relatively new to Nashville and making attempts to become entrenched as a drug distributor in Nashville;" and "Essentially, the victim in this case was wholesaling the Marijuana and that is the position the defendant wanted to assume." (*Id.* at 3-4). Such a theory was pure invention. It is not reflected in the police files. It is patently false and the State can point to no evidence that might support the theory.

Fourth, the letter states, "The victim in this case distributed marijuana from his home but did not distribute Cocaine." (*Id.* at 3). In fact, Daniels did distribute cocaine as reflected by the information obtained by the prosecution from the victim's brother. (FEx. 57). *See also* the police report describing "white powder" in one of the bathrooms (FEx. 3), the police report identifying a hypo syringe cap taken from Norma Norman (FEx. 4), and the autopsy report indicating that cocaine was found in the victim's urine (FEx. 14). (As discussed below, these police reports were never turned over to the defense.)

Fifth, the letter states, "The defendant had taken on the name of Scarface in the local drug community and that is all many of the people knew him by." (*Id.* at 4). If in fact the police ever thought that the Petitioner had been called Scarface, there is no reference in the prosecution's file, the police file, or any other known place, indicating that the Petitioner had assumed that name in the "drug community" or that that was the only name by which some people knew him.

Sixth, the letter states:

> He [the Petitioner] had advised the police and his attorney that the man he murdered in prison was a homosexual and that he murdered him in self-

> defense to prevent being raped. Further checking of court records reflect that the defendant was a leader of a prison gang attempting to gain control over the victim's gang and that the murder was a cold blooded premeditated murder, which reflects why the Federal judge gave the defendant the maximum punishment of life imprisonment when he could have sentenced the defendant to as little as ten (10) years for Murder in the Second Degree.

This, perhaps the most damaging of Zimmermann's statements to MTMHI, is a deliberate falsehood in several respects and, like Zimmermann's drug distribution theory mentioned above, is pure invention. The 1972 court records in fact confirm the Petitioner's claim that the 1972 murder was provoked by homosexual assaults on him. (FEx. 49 [Lowe's letter to Zimmermann], 131, 136 [Bishop deposition], and 142). There is no reference in the court records or federal prison records to any "prison gang." (*See* Bishop Deposition, FEx. 136). The term "gang" was Zimmermann's own creation out of thin air. (*See* Zimmermann's testimony, FT 1018-9). There was no evidence or testimony in the 1972 trial that the prior murder was a "cold blooded premeditated murder." In fact, both the prosecution psychiatrist and the defense psychiatrist who testified in that trial agreed that the killing was likely the result of a loss of control on the Petitioner's part. Finally, this statement fails to mention that the 1972 trial judge recommended in his final judgment that Petitioner be committed to an institution where he may receive psychiatric treatment. (FEx. 131).

While Zimmermann presented his false theories in his letter to MTMHI, he never furnished MTMHI (or the defense) with actual relevant information sitting in his file. For example, Zimmermann never informed MTMHI that shortly after the Petitioner's arrest and within forty-eight hours of the offense, Petitioner banged his head against the wall and the floor and

was placed in a padded cell for two days. (FEx. 7, 8). Zimmermann also never furnished MTMHI with any of the records pertaining to Petitioner's 1972 prior murder conviction, where Petitioner presented a viable insanity defense, or Petitioner's 1970 prior assault conviction, which included a motion of the prosecution for a psychological evaluation prompted in part by the Petitioner's headbanging. (FEx. 49, 131).

Zimmermann's statements to MTMHI go beyond zealous advocacy. They step over the line into pure fraud and deception. These statements were of significance in MTMHI's evaluation of the Petitioner. As Dr. Craddock testified, MTMHI had virtually none of the Petitioner's prior institutional records, and MTMHI relied entirely upon Zimmermann's letter for information regarding the circumstances surrounding the offense. (FT 105-6, 109, 151-2).

(b) <u>Misrepresentations About Prior 1972 Murder</u>. (Claim D.3)

Zimmermann defrauded Mr. Barrett regarding Petitioner's prior 1972 murder conviction. Zimmermann falsely told Barrett that the 1972 murder was not a response to homosexual rape, as Petitioner claimed (and as was the case), but rather was part of a "turf war in the prison between the two gangs as to who would control the drug trade in the prison." (P-CT, Vol. III, p 169, FEx. 130). In the post-conviction proceeding, Zimmermann explained his strategy:

> "My purpose on that was to hopefully keep from getting into this 1972 murder, and if Mr. Barrett could see what we had and understand what kind of potential rebuttal evidence that it would confine the defendant's testimony since I'd already provided to him the documentary evidence as part of discovery. I wasn't concerned about a discovery violation. But it was basically a tactic that I've learned that in cases like this if you have evidence that is a little bit questionable,

> that could raise an appellate issue if it's introduced-"

(P-CT, Vol. III, p. 170, FEx. 130).[15]

In fact, contrary to Zimmermann's testimony in the post-conviction hearing, he had not provided Mr. Barrett with "the documentary evidence as part of discovery." Zimmermann had not provided Mr. Barrett with either the 1972 trial transcript or the letter Zimmermann had received from Magistrate David Lowe, the attorney who prosecuted the 1972 case. (FEx. 45). This documentary evidence, which should have been turned over under *Brady*, supported Petitioner's version of the circumstances surrounding the 1972 murder, and it contradicted Zimmermann's statement that the murder was part of a "turf war" between "gangs" over the "drug trade" in the prison. None of the evidence mentioned either a turf war, gangs, or drugs. Instead, all of the documentary and testimonial evidence confirmed that the 1972 murder was related to homosexual attacks on the Petitioner.

Zimmermann attempted to justify his false statements to Mr. Barrett regarding the 1972 killing by claiming that he received his information from Mr. Delagrange, the F.B.I. agent Zimmermann brought to the Petitioner's trial. (FT 976-7). There are at least four problems with Zimmermann's attempted justification.

First, Zimmermann developed his theory about the 1972 killing, that it was part of a gang war over the drugs in the prison, before he ever talked to Delagrange. As mentioned above, Zimmermann set out this fabricated theory in his February 10, 1987, letter to MTMHI. (FEx. 34). It appears from the records in this case and Mr. Delagrange's testimony,

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[15] Zimmermann called himself to the stand over the objection of Petitioner's state post-conviction counsel. The Court overruled the objection and permitted Zimmermann to testify even though he was an attorney representing the State at the hearing and he had given no prior notice that he intended to testify.

however, that Zimmermann did not talk to Mr. Delagrange until after June 4, 1987. (*See* FEx. 61, 66, 70, and Delagrange's Depos., FEx. 136, at p. 21).

In this connection, it should be pointed out that according to correspondence in the prosecution's file, Zimmermann was attempting to portray the 1972 killing as a drug-related event before he ever talked to Delagrange. In his March 30, 1987 letter to David Lowe, Zimmermann said:

> I find it very difficult to believe that a Federal Judge would sentence an inmate to a life sentence in what purports to be nothing more than a defensive killing. Particularly when the circumstances underlying the killing involve a sexual attack upon the defendant. Therefore, it is imperative that we obtain information regarding the facts of this case and be prepared to offer them during the penalty phase of the trial.

(FEx. 45). In his April 10, 1987, letter to U.S. Attorney Henry Hudson, seeking permission to talk to David Lowe about the case, Zimmermann wrote:

> I am also interested in the fact that the previous Murder for which the defendant received a life sentence may pattern somewhat the manner in which the present case occurred.

(FEx. 48).

From this correspondence and the other circumstances involved in this matter, it is clear that Zimmermann was actively pursuing information about the 1972 murder that would fit his fabricated theory that Petitioner was involved in "drug turf" wars. It is therefore clear that Zimmermann's false statements to Mr. Barrett about the 1972 murder were not the product of mere mistake on Zimmermann's part.

Second, Zimmermann gave this story to Mr. Barrett before the trial, and therefore before he brought Delagrange to Nashville. (Barrett testimony, FT 294-5).

Third, Delagrange had no knowledge of drugs or "gangs" in the prison. He therefore had no basis whatsoever for affirming the theory Zimmermann was advancing to Mr. Barrett. (*See* Delagrange's Depos., FEx. 136, at pp. 17-20). After Zimmermann made his first contact with Mr. Delagrange, he interviewed Mr. Delagrange maybe two or three times over the telephone and again after Mr. Delagrange came to Nashville. Zimmermann, therefore, had the opportunity to find out from Mr. Delagrange what his knowledge was and the basis of his knowledge. (Delagrange Depos., FEx. 136, at p. 34). It must be presumed that when Zimmermann introduced Mr. Delagrange to Mr. Barrett, which occurred in the hall of the courthouse in the middle of trial, Zimmermann was aware that Mr. Delagrange did not have the knowledge that Zimmermann represented to Mr. Barrett.

Fourth, there can be no satisfactory reason or explanation for Zimmermann's deceptive strategy in light of the fact that Zimmermann possessed documentation that contradicted the story he was conveying to the defense.

Mr. Barrett relied upon Zimmermann's misrepresentations about the circumstances of the 1972 murder. (FT 299). Although Mr. Barrett would not use the word "deceived," he testified in this proceeding that he was certainly "misled" by Zimmermann "as to the strength of any potential testimony my client might give along those lines." (FT 308).

(ii) Brady Violations.

(a) 1972 Transcript. (Claim D.1.(1))

This Court has held that the prosecution's failure to turn over the 1972 transcript of Petitioner's prior murder trial constituted a *Brady* violation but that, "standing alone," this violation was not material and was therefore not grounds for relief. 999 F. Supp. at 1089-90. However, when viewed in the context of the other instances of prosecutorial misconduct, together with the ineffective assistance of defense counsel, this *Brady* violation takes on greater significance.

The prosecution was put on notice that the Petitioner's mental health might be an issue in the case. In response to Mr. McAlpin's motion. (FEx. 22), the trial court ordered the Petitioner's evaluation at MTMHI. (FEx. 28). On March 24, 1987, Mr. Barrett wrote Zimmermann and explained that he was "going to seriously look at my client's mental condition...." (FEx. 41). Zimmermann acknowledged receipt of this letter and the possibility that Mr. Barrett might raise an insanity defense. (FEx. 46). On July 1, 1987, Mr. Barrett wrote to Zimmermann stating that the defense might offer "some proof as to Mr. Jones' psychiatric status...." (FEx. 72).

The prosecution was aware of the possibility of mental state defenses from other sources as well. In his internal memo to Assistant District Attorney Eddie Barnard, "Team Leader," dated March 24, 1987 (FEx.42), Zimmermann made such statements as: "The defendant is just plain weird" (Bates stamp p. 000678); "I have received a copy of a transcript of the defendant's first trial where he plead not guilty by reason of insanity" (Bates stamp p. 000679); and "The *Scarface* element will undoubtedly have to be dealt with in some way so that the jury doesn't think the guy is plain wacko" (Bates stamp p. 000681).

Notwithstanding all of this, the prosecution deliberately withheld and actively concealed exculpatory information relating to the Petitioner's mental state, including the 1972 transcript.

As indicated in his internal memo to Eddie Barnard (FEx. 42), at least as early as March 24, 1987, Zimmermann had the 1972 transcript in his file. (FEx. 131). This transcript indicated that Dr. A.M. Masri, a psychiatrist, examined the Petitioner and testified for the defense, concluding that he "is basically a schizoid human being.... [W]e consider this an illness.... [H]e is a sick man." (FEx. 131, Bates stamp 767). Dr. Masri testified that the Petitioner was mentally ill and that as a result of this mental illness, he was unable to control himself under times of stress. On cross examination, based in

part on testing conducted on the Petitioner, Dr. Masri testified that the Petitioner had a mental disease which consisted of "delusional thinking and paranoid and schizoid personality and inability to withstand pressure and have [sic] no control." (FEx. 131, Bates stamp 771). Dr. Masri, as did Drs. Sadoff and McCoy before this Court, concluded that the Petitioner suffered from "borderline personality with periodic decompensation with loss of control, of ego control." (FEx. 131, Bates stamp p. 773). Even the psychiatrist who testified for the prosecution in the 1972 case, Dr. Robert J. Eardley, testified that the Petitioner lost control under the stress of the moment and, when asked if the Petitioner had been temporarily insane at the time, testified that he did not know. (*See* FEx 131, Bates stamp p. 781). The record of the 1972 case clearly indicates that Petitioner's mental state is, at the least, an exculpatory subject of relevant inquiry and consideration.

Zimmermann could give no satisfactory explanation for his failure to turn over the 1972 transcript. (FT 1014-7). Basically, all that Zimmermann could say was, "I didn't see the two as proving -- as what happened in '72 as proving what happened in '86. That was just my interpretation." (FT 1017).[16] To be exculpatory, however, evidence does not have to "prove" what happened at the time of the offense. It is improper for the prosecutor to make his own judgment as to the force of the evidence in determining whether he must turn it over to the defense. Zimmermann found that the 1972

[16] Zimmermann's attempted explanation for failing to turn over the 1972 transcript is strikingly similar to the explanation he gave in *Garrett v. State*, 2001 Tenn.Crim.App.LEXIS 206 (2001), for his decision to withhold exculpatory evidence in that case. In *Garrett*, the Tennessee Court of Criminal Appeals reversed a first degree murder conviction based upon Zimmermann's deceit. The Court said, "This Court is extremely troubled with General Zimmerman's decision to himself determine the reliability of the evidence and to refuse to turn [it] over," and further found that Zimmermann had "intentionally withheld" information and had misled the defense. *See Appendix D*, pp. 3-4, hereto.

transcript was significant enough to make reference to it in his memo to Eddie Barnard where he evaluated the strengths and weaknesses of their case against the Petitioner. (FEx. 42, Bates stamp p. 000679). This was clearly exculpatory information, and there is no valid excuse or reason for the prosecution's decision to withhold this transcript from the defense.

The prosecution's decision to withhold the 1972 transcript radically altered the course of the case. Mr. Barrett gave the following testimony in this proceeding:

> Q. If you had had the transcript of the 1972 trial and you had been aware in the 1972 trial James Jones had raised an insanity defense and you had been aware even the prosecution's expert witness said he may have lost control at the time of the incident, would you have handled this case differently?
>
> A. I very well might have. You have to break down as to the guilt or innocence phase and the sentencing phase.
>
> Certainly this information would have some bearing on both the guilt or innocence phase and the sentencing phase.
>
> I believe that had I had this information that I would have certainly taken a much closer look at any potential psychiatric defense that might be available to Mr. Jones both at the guilt and innocence phase and certainly as mitigation at the sentencing phase.
>
> Q. Would you have gone to the judge for money for psychiatric services?
>
> A. Based upon what I see here, I believe I would have, sir, yes.

(FT 309).

Zimmermann's decision to withhold the 1972 transcript is made more egregious by the fact that Zimmermann had in his file a letter dated April 15, 1987 which he received from Magistrate David G. Lowe, the person who was the prosecuting

attorney in the Petitioner's 1972 case. (FEx. 49). This letter was in response to Zimmermann's request for information about the 1972 prior murder conviction. This letter stated that the 1972 killing was a response to homosexual attacks on the Petitioner. This information would have corroborated the Petitioner's version of what happened in 1972; it would have mitigated the effect of the prior murder conviction; and if it had been disclosed to the defense, it likely would have kept Zimmermann from making misrepresentations to Mr. Barrett about the 1972 case, as discussed above.

The information Zimmermann possessed about the 1972 case was significant for two reasons: it mitigated the effect of the prior murder conviction, which the prosecution used as an aggravator supporting their request for the death sentence; and, it established the existence of Petitioner's mental illnesses and emotional instability and the likelihood of the existence of viable mental state defenses to the 1986 offense. Zimmermann's decision to withhold this information from the defense (and from MTMHI) can be explained in only one way, especially when viewed in the context of the other instances of prosecutorial misconduct: this was part of his successful scheme to fraudulently mislead first the defense lawyers, MTMHI, and then the court and jury about the nature of the 1972 case and about Petitioner's mental condition and character.

(b) <u>Police Reports On Petitioner's Condition at Time of Arrest</u>. (Claim D.1.(6))

The prosecution also withheld important information about Petitioner's mental state at the time of his arrest less than forty-eight (48) hours after the offense. Detective Garafola had prepared a police report that described the Petitioner at the police station upon Petitioner's arrest in the afternoon of February 19, 1986. (FEx 7). This report described the Petitioner as crying and went on to say:

> "He then started to hit his head on the table and then he jumped up still handcuffed to the chair

> and banged his head up against the wall. We got him under control and then took him to the booking room. In the booking room he started to bang his head on the wall again. Det. Elmore was able to control him."

This report was not turned over to the defense as *Brady* material prior to trial. When the report was turned over to the defense as *Jencks* material in connection with Detective Garafola's testimony, this portion of the report was redacted.

Second, there was an Incident Report regarding an incident that took place at 21:40 (9:40 p.m). on February 19, 1986, just hours after the arrest. This report stated that the Petitioner again started "beating his head against the floor," and that he was taken to a padded cell with instructions to an officer to check on him every half hour. The next Incident Report indicates that the Petitioner was not taken from the padded cell until two days later, on February 21, 1986, at 3:15 p.m. (FEx. 8). This collection of documents also was not turned over to the defense either before or during the trial.

This was not a case of mere non-disclosure. By redacting the first report of head banging, the prosecution actively concealed this information from the defense. This was important information. According to the testimony in this case by Dr. Craddock of MTMHI, the State's mental health expert, headbanging is an "extremely unusual behavior" for adults with normal intelligence, (FT 125), and this kind of self-mutilating behavior is a possible sign of mental health problems such as Borderline Personality Disorder. (FT 130-2).

By deciding to withhold this information, the prosecution created for themselves the opportunity to falsely argue to the jury that Petitioner showed no emotion, was neither mentally ill nor emotionally unstable, but instead was just a depraved murderer who committed the act out of pure pleasure and enjoyment. If this information had been disclosed, the prosecution would not have been in a position to make these kinds of false and misleading arguments with any effect.

(c) Transcript of Miller's First Statement to Police. (Claim D.1.(4))

The prosecution also failed to turn over to the defense prior to trial, as Brady material, the transcript of the April 23, 1987 tape recorded interview conducted by the prosecution of the co-defendant Devalle Miller. (FEx. 51). This transcript contains descriptions by Miller of the Petitioner that suggest a possible mental state defense.[17] For example, Devalle Miller gave the following descriptions in his statement:

> "... and I was standing there and its like James went from day to night." (Bates stamp p. 000166).
>
> "...he was babbling on and on and on..." (Bates stamp p. 000167).
>
> "... because I was riding a uh uh to what I perceived as a maniac." (Bates stamp p. 171).
>
> "I really didn't want him in my house for the simple fact I didn't know if he was going to turn himself on back in my house with me and my family ..." (Bates stamp p. 000173).

The prosecutors themselves explicitly acknowledged that Devalle Miller's statements might raise a question about the Petitioner's mental health. In the margin of the transcript next to Miller's statement about how he perceived the Petitioner as a "maniac" (Bates stamp p. 000171), ADA Eddie Barnard had handwritten the comment: "Insanity + mitigating factor."

Although the prosecution did turn over this transcript as Jencks material during the course of the trial, that did not satisfy the prosecution's obligation under *Brady*. Exculpatory information about a defendant's mental state must be turned over sufficiently in advance of the trial to enable the defense to

[17] This transcript was exculpatory for two reasons: (i) as discussed in this part of this Brief, it contained exculpatory information relevant to the Petitioner's mental state; and (ii) as explained below, it contained statements that contradicted Devalle Miller's trial testimony.

consider the defendant's potential guilt and sentencing stage defenses, to take steps to obtain a professional evaluation, and to prepare the case for trial.

(d) Miller's Statements to Prosecution about the SGM. (Claim D.1.(3))

As discussed below, the prosecution spent hours with Miller preparing him to testify. From the testimony given by Miller in Miller's own sentencing hearing (FEx. 93) and in Petitioner's state post-conviction hearing (P-CT, Vol. III, pp. 13-43), it is now apparent that Miller gave the prosecution at least the following information concerning the SGM and its involvement in the offense:

- that Miller and Petitioner joined the SGM, a racial identity religious organization devoted to bettering the Black community (P-CT, Vol. III, at 15);
- that Miller and Petitioner were "brainwashed" by the organization (*id.* at 37);
- that there was a paramilitary group within the SGM that consisted of Allen Boyd, William Beard, Miller and Petitioner (*Id.* at 15);
- that Miller and Petitioner went to Daniels' apartment on the evening of the offense as part of an SGM mission to intimidate Daniels into ceasing his drug selling activities, which was part of the SGM's larger mission to rid the community of drug dealing (*Id.* at 19);
- that William Beard gave Miller a pistol to be used in "operations to clean up the Black neighborhoods (*Id.* at 16);

- that Petitioner told Miller that he, Petitioner, got his shotgun from Allen Boyd (*Id.* at 17);[18]
- that on the night of the killing, after leaving Daniels' house, Miller and Petitioner went to Miller's apartment and Petitioner made a telephone call from a booth; and Allen Boyd showed up a short time later (*Id.* at 26);
- that after leaving the victims' apartment, Miller heard Boyd say something to the effect of "just be cool and go back to work." (*Id.* at 28);
- that after Petitioner's arrest, Miller went to Beard who gave him getaway money (*Id.* at 29-31);
- that Miller intentionally misled Beard as to where he was going because he feared that Beard, Boyd and the SGM might kill him; Miller also told others while on the run that he was fearful of Boyd, Beard and Mitchell Hollie, all of the SGM (*Id.* at 31, 36-7); and
- that members of the SGM provided Miller's wife, Karen, with financial assistance while Miller was on the run. (*Id.* at 35-6).

Miller confirmed in his post-conviction testimony that he related all of this information to Zimmermann; and Zimmermann never disputed this either during his very brief cross-examination of Miller or elsewhere. (*Id.* at 33

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[18] The fact that Petitioner obtained his gun from Boyd was verified from the F.B.I. gun trace introduced into evidence in this proceeding. *See Motion to Expand Record* and *Order* entered April 8, 1998 (Docket Nos. 202, 204).

By deciding to withhold this *Brady* information from the defense, the prosecution created for themselves the opportunity to falsely portray Petitioner as the sole planner and decision-maker relating to the events surrounding the offense, and to "debunk" any effort by Petitioner to mention the SGM during his sentencing hearing.

(e) <u>Lab Reports about Blood Evidence</u>. (Claim D.1.(7))

This Court previously considered the merits of Petitioner's *Brady* claim relating to the T.B.I. lab report which found that no blood was found on clothing seized from petitioner's apartment, including Petitioner's long dark wool coat. This Court rejected this *Brady* claim on the ground that the lab report had been provided to Petitioner's first counsel, Mr. Neal McAlpin and had been filed with the trial court. 999 F.Supp. at 1090.

Although this Court has rejected this *Brady* claim, Zimmermann's conduct around the blood evidence was deceptive and further evidences both the prosecution's persistent and deliberate scheme to deceive and the prejudicial effect of that scheme, especially when viewed cumulatively with the ineffective assistance of Petitioner's trial counsel.[19]

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[19] This Court found that trial defense counsel had an opportunity to know about the blood evidence and to present it to the jury, and that it was not the prosecutor's fault that the evidence was not presented to the jury. *See*, 999 F.Supp. at 1090. It is surely one or the other. If this failure was the fault of the defense attorney, and not the prosecutor, this Court should grant relief due to counsel's ineffectiveness, rather than prosecutorial misconduct. The materiality and the prejudice resulting from the jury's inability to consider the blood evidence is obvious. *See*, Juror Affidavits, being filed contemporaneously herewith. The resulting prejudice accrues to Petitioner with regard to the jury's verdict of guilt and its verdict at the sentencing stage of a sentence of death. *See*, Evidence That Petitioner Was Not The Assailant, <u>Appendix E</u>. As the Court observed in *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995):

Zimmermann was fully aware of the significance of the lab report. In his internal memo to Assistant District Attorney Eddie Barnard, Zimmermann identified the lab report as a "weakness in [the] case" as follows:

> T.B.I. Lab Report was unable to find any blood staining on the long wool coat worn by Jones. Photographs of the decedent's house show blood spattering all over the kitchen....[I]f the defendant did wear his coat the entire time he obviously was not present when the stabbing occurred. Also, the police seized a pair of work pants during the search of the defendant's apartment which had red spots all over it which was found not to contain any human blood stain. The red particles on the defendant's pants came from red dye used at the publishing Board where the defendant worked.

> Mr. Banks has framed his *Brady* and ineffective assistance arguments before this court in the alternative. He argues that the State withheld exculpatory evidence in violation of *Brady*. Alternatively, he argues that if the State did not withhold the evidence, then his trial counsel was ineffective for failing to use the evidence in his defense. Under either analysis, our final inquiry is the same: has our confidence in the outcome been undermined? *See Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068 (ineffective assistance of counsel); United States v. Agurs, *427 U.S. 97, 1094, 96 S.Ct. 2397098, 49 L.E.2d 342 (1972) Brady* violation).

54 F.3d at 1515, n. 14. Likewise, Petitioner "framed his *Brady* and ineffective assistance arguments in the alternative" on the issue concerning the blood evidence from the state laboratory and its significance on the question of the identity of the assailant. *See*, Amended Petition, ¶¶ D.(1)(7) (prosecutorial misconduct); and, A.(1) and (2); E.(2)(a) and (e) (ineffective assistance of counsel).

(FEx 42 at Bates stamp p. 677). The police reports describing the crime scene, which were never turned over to the defense, also described the extensive blood splattering.

This "weakness" in the prosecution's case was confirmed by the evidence introduced before this Court. Zimmermann testified, "I think when you have a murder with this much splatter, you would think some would have gotten on the defendant, yes." (FT 917). Dr. Kris Sperry, the Medical Examiner for the State of Georgia, also testified before this Court that, based on his review of the autopsy report, the T.B.I. file, and the blood evidence, the assailant would have had blood stains on his clothes. Dr. Sperry also testified that the blood stains would not have been removed by cleaning or washing and would have been detected by the tests employed by the T.B.I.. (FT 38-61).

Although the prosecution may have provided the T.B.I. lab report to Mr. McAlpin, Petitioner's original counsel, Zimmermann deceptively managed to keep the lab report out of Mr. Barrett's view. Prior to the trial Mr. Barrett filed with the court and served on the prosecutor a request for all exculpatory information. (FEx 63). The prosecution responded to this request by turning over to Mr. Barrett the results of the comparison tests of Petitioner's clothing to crime scene soil samples (FEx 62), which were of no exculpatory significance because Petitioner had always conceded that he was at the crime scene. But Zimmermann withheld the T.B.I. lab report. Further, in a letter from Zimmermann to Mr. Barrett dated March 30, 1987, in response to Mr. Barrett's "form discovery request," Zimmermann responded only to a specific *Brady* request for the identity of "other subjects or suspects that may be involved." (FEx 41, 46). Again, Zimmermann never notified Mr. Barrett about the exculpatory blood evidence. Whether or not these actions amount to a specific *Brady* violation, Zimmermann's conduct through this period prior to trial was not forthright and certainly was inconsistent with the prosecutor's duty to seek justice.

Zimmermann's ploy worked. Barrett never became aware of the T.B.I. lab report and therefore never raised any question at trial about the blood evidence.

As a consequence, Zimmermann was free to falsely use Petitioner's long dark wool coat at trial to help satisfy his need to identify Petitioner as the assailant, even though this coat tested negative for blood. Both of the prosecution's key witnesses at the trial testified that Petitioner was wearing his long black wool coat throughout the time period when the offense occurred. The prosecution introduced the coat into evidence during Norma Norman's testimony. (T 1333, trial exhibit 12). On at least five separate occasions during her testimony, she described Petitioner as wearing the "long black coat." (T 1332, 1334, 1343, 1364, 1366-7). The co-defendant Devalle Miller, on at least two separate occasions during his testimony, described Petitioner as wearing the coat during the time of the offense, and he too identified trial exhibit 12 as the coat Petitioner was wearing. (T 1451, 1454-5). During the guilt stage closing argument, the prosecution displayed the coat to the jury, repeatedly describing it as the "gangster coat" that Petitioner wore at the time of the offense. (T 1672-3). Significantly, although the prosecution was aware of the weakness in their case from the lack of blood stains on the coat, and although as explained below they spent long hours on several occasions preparing (manipulating) Miller for his testimony, no one ever indicated that Petitioner ever took the coat off at any time while the offense

occurred.[20]

(f) <u>Other Police Reports.</u> (Claim D.1.(8))

Several other police reports were not turned over to the defense even though they contained exculpatory information. (FEx. 1-8, 9). Among other things, these police reports indicate that: blood was splattered on the walls of Daniels' apartment, which is exculpatory information relating to the question whether Petitioner actually performed the stabbings; "The chest of drawers in [the master bedroom] had not been opened. It did not appear that the room had been searched by anyone," which is exculpatory information relating to the question of whether Petitioner took the $300, which Norman had testified was taken from that location; and that when the first officers arrived at the scene, there were a number of people who had already been in the apartment, which is exculpatory evidence raising a question about whether, if $300 was stolen, Petitioner was the one who took the money. (*See* discussion below on the prosecution's manipulation of Norman's testimony on this point.)

(iii) <u>Altering Testimony</u>.

(a) <u>Miller's Testimony</u>. (Claim D.2.(1))

There were clear and obvious inconsistencies between Miller's April 23 statement (FEx. 51) and Miller's trial testimony. The circumstances of this case demonstrate that the prosecution improperly manipulated Miller's testimony to

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[20] The failure to present the blood evidence was prejudicial to Petitioner at both the guilt and sentencing stages. At guilt, it would have raised at least reasonable doubt about whether Petitioner was the assailant and therefore whether he was guilty of premeditated murder. (For a further explanation of Petitioner's guilt stage defense based on the blood evidence, see <u>Appendix E</u> hereto). For the same reasons, at sentencing it would have raised at least "residual doubt" about whether he was the assailant, which is a mitigating factor to be considered by the jury. *State v. Teague*, 897 S.W.2d 248, 256 (Tenn. 1995); *State v. Hartman*, 42 S.W.3d 44 (Tenn. 2001). The jury affidavits in this case demonstrate that the blood evidence is a powerful mitigating factor.

conform to the false picture the prosecution presented to the jury.

Brady requires the prosecution to disclose information that could be used to impeach the credibility of the prosecution's witness. In this case, the prosecution violated *Brady* by failing to disclose to the defense, prior to trial, the fact that Devalle Miller changed his story to the prosecution, and that his trial testimony would contradict in many material respects the statements he previously gave to the prosecution.

It goes without saying that in a case of this sort, the credibility of a co-defendant's testimony will be suspect. As Zimmermann said, "[W]hen you have co-defendants they always want to point the finger at each other." (FT 912).

Because of the problems with the blood evidence and the lack of other evidence that might establish the Petitioner as the assailant, the prosecution realized that Miller was a crucial witness to them. The prosecution, therefore, worked on Miller intensively.

They took advantage of the one day Miller was in Tennessee unrepresented by counsel, April 23, 1987, to interview him. *See* Ross Alderman's testimony (FT 1026-30). Zimmermann testified before this Court that he would not interview somebody charged with murder if they are unrepresented by counsel unless they "execute a waiver of counsel." (FT 934). Yet, there is no indication that Miller executed a waiver of counsel when the prosecution interviewed him on that day. The following day Miller was appointed counsel when he appeared for the first time in court on the jail docket and he was represented continuously thereafter.

Subsequently, the prosecution was advised that Miller's story had changed. Miller's attorney, Ross Alderman, told Zimmermann that there were discrepancies between Miller's version of what happened as compared to the version Miller set forth in his April 23 interview. (FT 1033). The prosecution then decided to spend time with Miller. Zimmermann testified before this Court that if he had to interview a co-defendant

witness more than once or twice, it would be "because, in my opinion, I am trying to find additional evidence, other leads, things to corroborate their testimony." (FT 938). It is clear from the facts of this case, however, that Zimmermann did more with Miller than pursue additional evidence or other leads. He coached Miller to shape his testimony. (*See, e.g.*, FT 1037).

Consequently, the prosecution met with Miller to prepare his testimony. Zimmermann testified before this Court that he could "only remember one time where we had what I would call a pretrial preparation meeting." (FT 938). In fact, according to Mr. Alderman's testimony, in addition to the April 23 interview and the mid-June meeting, the prosecution also met with Miller on July 6 for 3.4 hours, July 7 for 3.5 hours, July 9 for 3.6 hours, and July 12 for 2.5 hours, for a total of 13 hours during the days immediately preceding the guilt stage of the trial where Miller testified. (FT 1034-8). Mr. Alderman testified that it seemed as if Zimmermann was spending a "long time" preparing Miller to testify. (FT 1036-7). During those meetings Zimmermann explained to Miller what other witnesses were going to say. *(Id.)* Mr. Alderman further testified in this proceeding that there were significant discrepancies between the version of the facts described by Miller in these meetings and the version he gave in his April 23 statement. *(Id.)* Also during these interviews Miller told Zimmermann about the SGM. (FT 1038-40). He described the group as a paramilitary arm of the Gospel Ministry which had a plan to drive drug dealers out of the community. (FT 1039). He identified the leaders of this group as Boyd, Beard and Hollie, and he expressed concern or fear of what others might do to him if he testified. (FT 1040). Zimmermann never disclosed before trial the fact that Miller had changed his story or any of the information Zimmermann acquired during the course of his interviews of Miller.[21]

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[21] To induce Miller to give the testimony the prosecution was looking for, the prosecution offered Miller a deal. Miller was charged along with the Petitioner with capital first degree murder, assault with intent to commit

(b) Norman's Testimony. (Claim D.2.(3))

The indictment against Petitioner included a count charging that Petitioner "did steal, take and carry away from the person and against the will of Patrick Daniels, certain personal property, to wit, approximately three hundred dollars ..." (T. 1270-1). In addition to seeking a conviction against Petitioner on this charge, the prosecution also included this charge as one of the aggravating circumstances supporting their request for the death penalty. There was, however, no evidence that anyone took any money from Patrick Daniels. At the time of trial, there was only a suggestion that money may have been stolen from Norma Norman, and not from "the person of Patrick Daniels."

To get around this problem, the prosecution determined to manipulate Norman's testimony by asking falsely misleading questions. In their trial notes, the prosecutors wrote with regard to this matter, "Items taken - $300 cash and anytime teller card (leading questions to make her say it was

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murder in the first degree with bodily injury, and armed robbery. (FEx. 44). In exchange for his testimony, the prosecution offered a plea bargain that would reduce the original three charges to the two reduced charges of second degree murder and armed robbery. (FEx. 92; Alderman testimony, FT 1041-3). Instead of a possible death sentence or life sentence, the reduced charges would carry sentences ranging from 10 to 35 years with the possibility of earlier parole. (FT 1044; FEx. 93).

The defense requested the terms of any settlement agreement between the State and any witness in return for the witness's testimony. (FEx. 42, Discovery Requests, ¶ 12). Prior to the trial the prosecution filed a RESPONSE TO MOTION FOR EXCULPATORY MATERIAL REGARDING PROMISES TO STATE'S WITNESSES, in which the prosecution purported to set forth the terms of its agreement with Miller. (FEx. 67). This Response disclosed only that the prosecution had agreed not to seek the death penalty. This Response failed to disclose that the prosecution had also agreed to a plea to reduced charges that would limit the length of any prison sentence Miller might receive. By failing to disclose all of the terms of the plea agreement that were favorable to Miller to induce his testimony, the State violated the Petitioner's due process rights under *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104.

theirs)," and "$300 and anytime teller card (leading question to say cash was theirs)." (FEx. 77)>

The leading questions by the prosecution worked, for Norman gave the desired response to the leading questions. (*See* T. 1390). Through their improper use of false leading questions, the prosecution managed to conform Norman's testimony to the indictment.

In this context, it should be further pointed out that a careful reading of Norman's testimony establishes either that the $300 never existed or, if it did, Petitioner was not the person who took it. Earlier, Norman testified that the $300 was in the chest of drawers in the bedroom. (T. 1389). She offered no testimony that Petitioner or Miller ever went into this bedroom. Her only testimony on the alleged "theft" of the money was:

Q. Was the [$300] there when they left?

A. Not that I know of.

Q. Did they take it?

A. Not that I know of.

(T. 1390). Notwithstanding this testimony, and the absence of any other proof on the subject, Zimmermann proceeded to falsely argue at closing that Petitioner "was the only one that went through the bedroom.... Ms. Norman said, he went and rummaged through the room." (T. 1669).

This represents but one more example of the ineffective assistance of Petitioner's trial counsel, Zimmermann's unethical opportunism in taking advantage of defense counsel's failings, and the resulting false picture that was presented to the jury.

(iv) Inadmissible Information to the Jury. (Claim D.6)

This claim was presented to the Tennessee Supreme Court on the direct appeal where it was held that the prosecution had, in fact, acted improperly. The Tennessee Supreme Court found that this constituted prosecutorial misconduct.

Describing Zimmermann's behavior, the Tennessee Supreme Court found:

> Defendant made a motion in limine prior to the sentencing hearing to prohibit any mention at the hearing that defendant was on parole at the time of the offense. In the course of arguing the motion the State's attorney stated he would not pass the records of defendant's prior murder conviction to the jury since they showed that defendant had received a life sentence and described the circumstances of the crime. Defendant's parole officer, who was identified only as an employee of the U.S. District Court in Nashville, testified to introduce the fact of defendant's two prior convictions for second degree murder and assault with a deadly weapon. The State was allowed over defense objection to ask the nature of the deadly weapon. The witness answered that it was a knife. The State's attorney then passed to the jury the record of defendant's conviction for assault with a deadly weapon which included a two-count indictment charging him with robbery in addition to the assault. Defense counsel raised an objection on the basis that the information it contained was irrelevant and requested the court to instruct the jury that the only information contained in the record which was applicable was the fact of the conviction. The trial judge gave the instruction requested.
>
> The defense objection was appropriate. The conduct of the State's attorney **bordered on deception** by which he was able to get before the jury information which was not evidence in the case they had under consideration. The action of the State was **improper**.

State v. Jones, 789 S.W.2d 545, 551-2 (Tenn.1990).[22]

This Court previously addressed this claim only in isolation, and not in the context of Petitioner's other prosecutorial misconduct claims together with Petitioner's ineffective assistance of counsel claims. The facts surrounding this claim, as found by the Tennessee Supreme Court, constitute further evidence of the fraudulent and deceptive practices of the prosecution in Petitioner's case; and the prejudice from this misconduct on the part of the prosecution must be cumulated with the prejudice caused by all of the other errors in this case.

C. Effect of Prosecutorial Misconduct: False Picture of the Case.

The prosecution's persistent pattern of fraud and deception combined with the ineffective assistance of defense counsel, presented the jury with a completely false picture of every aspect of this case. Among other things, the jury was given a false picture of: (i) the Petitioner as a person; (ii) the nature of the prior 1972 conviction; (iii) the circumstances surrounding the offense including Petitioner's motivation and the identity of the assailant; and (iv) Petitioner's attitude towards the offense.

In other words, this is not merely a case where the jury failed to hear everything that it should have heard. This is a case where what the jury did hear was patently false, misleading and grossly prejudicial.

(i) False Picture of the Petitioner as a Person.

The effect of obfuscating the blood evidence, misrepresenting to MTMHI and defense counsel the

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[22] In the direct appeal, of course, this was the only prosecutorial misconduct claim presented to the Tennessee Supreme Court. This misconduct obviously represents only a fraction of the total body of prosecutorial misconduct that was later discovered during collateral litigation.

circumstances surrounding Petitioner's prior murder conviction, and withholding evidence on these matters, was to paint a false and misleading picture of Petitioner as a person.

The defense was oblivious to the fact that Petitioner's coat tested negative for blood stains and to the significance of any of the blood evidence in the case (especially in light of the withheld police reports describing the extent of blood splattering at the scene of the offense). The prosecution took advantage of defense counsel's oblivion by using the coat to graphically mischaracterize Petitioner as merely a drug stealing "gangster." Throughout the trial the prosecution relied upon the coat as the item of clothing Petitioner wore during the offense and referred to it as the "gangster coat."

In the trial, the prosecution introduced Petitioner's coat as Exhibit 12 (T. 1333) and elicited the following testimony from Norma Norman:

A. ...Mr. Jones had on this **long black coat**,...

(T. 1332).

Q. Anything about that coat cause you any concern?

A. First thing I thought, it was a **gangster coat**.

Q. A **gangster coat**?

A. Yes.

(T. 1334).

A. And Mr. Jones walks in [to the apartment] and he had on this **long black coat**.

Q. Same coat that you described for the ladies and gentlemen of the jury?

A. Right."

(T. 1343).

The prosecution then referred to the "gangster coat" in their guilt stage closing argument:

> He had a **gangster coat** on, is what she called it – a **gangster coat**. And she noticed that. Now, I don't know what she saw (**indicating exhibit**), and she remembered it. **And he wore it that night**.

(T. 1672-3).

> Listen to this, ladies and gentlemen, the man, the next night, when he goes over there and he says we're going to stab these people, he goes by his house, and what does he do, he changes into his **gangster uniform**.

(T. 1673).

If the blood evidence had been disclosed in a forthright manner, and if the defense had properly evaluated that evidence, the prosecution would have been unable to use the coat in this manner to wrongfully characterize Petitioner as a "gangster." Zimmermann was well aware that the victim's blood was not on the coat and, as pointed out above, in an internal memo he specifically referred to that fact as a weakness in the case. (FEx. 42, Bates stamp 000678). It was therefore a deceit for him to display the coat to the jury, representing that Petitioner wore the coat that evening, while at the same time withholding the information that the coat had tested negative for blood stains.

(ii) <u>False Portrayal of 1972 Conviction</u>.

The prosecution also took advantage of the effect of their misconduct to mischaracterize Petitioner's prior murder as a premeditated, deliberate murder, contrary to all of the evidence in the 1972 case.

> Because you see, he had faced this jury before; not you, but he had faced a jury before and heard the very same thing before, when he murdered someone else, **willfully, deliberately with malice aforethought**.

(Sentencing stage closing argument, T. 1979).

> Ladies and gentlemen, he was a murderer, and he was a murderer before he ever got in that group – just a low down murderer, no morals – no morals.

(Sentencing stage closing argument, T. 1982).

If the prosecution had refrained from misrepresenting the circumstances surrounding the 1972 conviction and had disclosed the exculpatory evidence in their files about the 1972 case, and if Petitioner's counsel had properly investigated the 1972 case, then this false characterization never would have been presented to the jury. Instead, the jury would have been told the truth: that the 1972 murder was an emotionally charged response by a mentally ill person to repeated homosexual rape in prison and, that under the Tennessee definition of insanity at least, Petitioner probably was insane at the time of that offense. The prosecution never would have gotten away with mischaracterizing the 1972 murder in a prejudicial way as a "deliberate" murder.

(iii) <u>False Picture of the Circumstances Surrounding the 1986 Offense</u>.

By failing to turn over *Brady* material regarding Miller's prior statements to the prosecution and information about the SGM, and by improperly manipulating Miller to give false and misleading testimony, the prosecution created the situation where they could deliberately misrepresent to the jury the circumstances surrounding the offense in this case. Although Petitioner and Miller went to Daniels' apartment as part of a mission organized by the SGM (including Allen Boyd and William Beard) with the altruistic (albeit misguided) purpose of ridding the community of drugs, the prosecution mischaracterized the offense as a pure drug robbery entirely designed and led by Petitioner.

The prosecution began the mischaracterization of the offense in their guilt stage opening statement:

> And later that evening the defendant told Mr. Miller that he knew of a guy that they can roll, that they could rob, that they could gangster him and steal his drugs.

(T. 1275).

The prosecution, through Miller's manipulated testimony, further characterized the offense as a drug robbery without any reference to the SGM or the motives behind the event:

> A little bit later on he had pulled me off to the side and he said, you know, this little punk over here that I got this from has got some pretty good reefer, you know, I think we can probably go over there and … He told me that he had got some good weed from the guy. The guy had some good weed. And he had reason to believe that he had more. And he said that the guy was a little punk and we could probably go gangster him…. To me that meant, going, taking his dope, his marijuana – rousting him up and, you know, taking his --- [Robbing him?] Yes.

(T. 1449-50).

Also through Miller's manipulated testimony, the prosecution characterized the "plan" as entirely Petitioner's, again without reference to the SGM:

> Q. Did you agree to that plan?
> A. Yes, I did.
> Q. Whose plan was it?
> A. It was the defendant's.

(T. 1451).

This false characterization was carried into the prosecution's guilt stage closing argument where the prosecution misrepresented to the jury:

> And who was the leader of this whole thing? Who gave all the orders? Who gave all of the commands?" [Referring to Petitioner.]

(T. 1706).

The multiple instances of prosecutorial misconduct finally enabled the prosecution, in the sentencing stage closing argument, to discredit as "bunk" any notion that the

SGM was involved, even though the prosecution was told about the SGM's involvement:

> [H]e [the Petitioner] knows that that story about being a religious cause will be rejected by you as bunk.

(T. 1982-3).

If the prosecution had honored their *Brady* obligation by turning over to the defense prior to trial the statements made to them by Miller and the information they had received about the SGM, and if defense counsel had properly investigated this case, the prosecution never would have been in a position to paint this kind of false and prejudicial picture to the jury.

(iv) False Picture of Petitioner's Attitude Towards the Offense.

By deliberately making misrepresentations to MTMHI and to defense counsel regarding petitioner's prior 1972 murder conviction, and by withholding *Brady* material regarding both the prior conviction and the other signs of Petitioner's mental illnesses and emotional instability, the prosecution was able to invent for the jury the prosecution's own false picture of Petitioner as a "depraved killer" who had no psychological or emotional problems.

The prosecution repeatedly misrepresented to the jury that Petitioner had no emotional or psychological problems and therefore was just a "depraved" completely immoral person, which clearly is not the case. The prosecution established this false theme at the outset of the sentencing hearing:

> [I]t showed the depraved mind the defendant really has. Not a sick mind. **Not so sick of a mind that he is mentally ill**, just depraved – just depraved.

(Sentencing stage opening statement, T. 1805).

This theme was carried through to the sentencing stage closing argument:

> That's because, ladies and gentlemen, you're looking at a depraved man, **not someone suffering from severe extreme emotional disturbance**, a depraved man.

(Sentencing stage closing argument, T. 1981).

> [N]ow, he [defense counsel] voir dired you on, would you believe a psychiatrist, or a psychiatric examination or whatever, about **extreme emotional disturbance or whatever? There is none of that here today**.

(Sentencing stage closing argument, T. 1981-2).[23]

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[23] In fact, there is abundant and irrefutable evidence that Petitioner suffers from mental illness and that he had mental state guilt stage defenses available to him at the time of his trial. Petitioner has a long documented history of displaying symptoms of mental illness, of being institutionalized for and receiving diagnoses of mental illness, and of being administered powerful antipsychotic and other medications for mental illness. *See* Social History (FEx. 141). As pointed out elsewhere, in Petitioner's 1972 trial Dr. Masri, a psychiatrist, gave Petitioner a borderline personality diagnosis and testified further that Petitioner "decompensates" when under stress – an evaluation similar to Dr. Sadoff's evaluation presented to this Court. Even the psychiatrist who testified for the prosecution in the 1972 case, Dr. Robert J. Eardley, testified that the Petitioner lost control under the stress of the moment and, when asked if the Petitioner had been temporarily insane at the time, testified that he did not know. (*See* FEx. 131, Bates stamp p. 781). In Petitioner's state post-conviction hearing, Dr. Nurcombe, a psychiatrist, similarly diagnosed Petitioner with Post-Traumatic Stress Disorder. Dr. Nurcombe's testimony went unchallenged by the state. In this habeas proceeding, both Dr. Sadoff and Dr. McCoy diagnosed Petitioner with mental illnesses. Although Dr. Craddock of MTMHI did not give Petitioner a diagnosis, he admitted that he did not have access to Petitioner's social history, and he acknowledged many of the symptoms of Petitioner's mental illness. (FT. 130-2). Dr. Craddock, therefore, testified before this Court that he "would not take issue" with a diagnosis of Borderline Personality Disorder for Petitioner. (FT. 140). Dr. Craddock acknowledged that persons with this kind of disorder can suffer dissociative and psychotic episodes. (FT. 129, 132: "That is what borderline personality disorder means. The borderline of becoming psychotic.") Dr. Craddock also admitted that he never reached an opinion

Because the prosecution's pattern of misconduct, combined with the ineffectiveness of defense counsel, allowed the prosecution to falsely portray Petitioner as being a person without mental illness or emotional disturbance, the prosecution created a situation where it could falsely claim in a highly prejudicial manner that Petitioner killed for "pure pleasure" and "enjoyment". The prosecution struck this theme in the guilt stage of the case and carried over to the sentencing stage through effective repetition:

> Whoever did that, ladies and gentlemen, **enjoyed it**, had to have.

(Guilt stage closing argument, T. 1679).

> It was all part of the **enjoyment** that person who did the stabbing had.

(Guilt stage closing argument, T. 1711).

> Is there any reason, is there any justification why he took the life of Patrick Daniels? Is there any? None, except **pure pleasure**.

(Sentencing stage closing argument, T. 1942).

> Ladies and gentlemen, as a man thinketh in his heart, so is he. And you saw the real James Jones in the picture. And now, when you saw those convictions, you know that's the real James Jones because that's how he is. and when he comes here from Chicago, he is not here two years before a vicious brutal murder at his hands – at his planning – **at his enjoyment** – and that's depraved.

(Sentencing stage closing argument, T. 1984-5).

The net effect of the prosecutorial misconduct together with the ineffective assistance of counsel, therefore, was to falsely paint Petitioner as the ideal candidate for a guilty

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on whether or not Petitioner had a diminished capacity mental state guilt stage defense, or whether or not Petitioner's mental condition might be a mitigating factor at sentencing. (FT. 142-3).

verdict for premeditated murder and the death sentence: a cool-minded "depraved" "gangster" with "no morals" and free of any mental illness or emotional disturbance who singularly planned and led a drug robbery, designed purely for personal gain, and in the course of that robbery killed for pure pleasure and enjoyment. As the abundant and compelling evidence in this habeas proceeding shows, however, Petitioner is not that type of person, the SGM was deeply involved in directing Petitioner's actions, and the true circumstances surrounding the offense are entirely different from what the prosecution falsely portrayed to the jury. As the jury affidavits demonstrate, and as should be clear from the face of the record after considering the cumulative effect of all the errors in this case, if the jury had been presented with the true picture of Petitioner and the circumstances surrounding the offense, the result of the trial would have been completely different.

V. The collective consideration of claims

Previously, in this Memorandum, Petitioner cited authority for the proposition that it is incumbent on this Court to cumulate error in the determination of whether this trial was fair and its result reliable. In the process of making this determination, as far as errors of the prosecutor and defense counsel are concerned, it is not necessary to demonstrate that the outcome would have been different, but for the errors. It is necessary only for this Court to ultimately determine that the errors "undermine[d] confidence in the outcome." Strickland, *supra*, 104 S.Ct. at 2068; and, *Kyles, supra,* 115 S.Ct. at 1565. If this Court's confidence in the outcome is "undermine[d]" by the errors committed, it must grant relief. The law requires that the final measure of whether this undermining of the confidence has occurred can only be taken upon a cumulative and collective consideration of the errors committed in the case that contributed to the result.

A. Prosecutorial misconduct claims erroneously deemed defaulted.

We have demonstrated in this Motion and Memorandum that recently promulgated Tenn. Sup. Ct. R. 39 made clear that this Court erred in its determination that claims raised in the appeal of right to the state Court of Criminal Appeals, but not in the Tenn. R. App. P. 11 discretionary appeal to the state Supreme Court, were defaulted and not preserved for federal review. Petitioner now asks this Court, pursuant to F. R. C. P. 60(b), to review on the merits those preserved claims. Specifically, the claims to which Petitioner refers are the prosecutorial misconduct claims made in Petitioner's Amended Petition, ¶¶ D.1.(2)-(4), (6)-(8), (12); D.2.(1)-(3); D.3; D.6; and D.8.(4). *See*, Motion at ¶ 23. Petitioner has demonstrated the materiality of these instances of prosecutorial misconduct sufficient to require this Court to set aside the conviction and sentence in this case. When the above-listed instances of prosecutorial misconduct are considered collectively with the other errors in this case, including other errors of prosecutorial misconduct and errors of ineffective assistance of counsel previously recognized by this and other courts, there can be little doubt that this case must be reversed. *See*: (1) attached hereto, Appendix A: a chronological summary of the instances of prosecutorial misconduct and ineffective assistance of counsel and how they cumulated to eliminate any opportunity for a fair trial in this case; (2) attached hereto, Appendix E: a summary of record evidence that Petitioner was not the assailant; (3) filed in separate pleading: the Affidavits of eight jurors, who deliberated in this case, reflecting their reaction to the fact that they were not give an opportunity to consider critical, relevant evidence in the trial of this case.

B. Prosecutorial misconduct claims previously considered by this Court

From among these instances of prosecutorial nonfeasance and misfeasance, referred to above, this Court has already considered on the merits the claims found at ¶ D.1.(1) (the prosecution's failure to produce the 1972 murder trial transcript); and ¶ D.1.(7) (the prosecution's failure to produce lab reports indicating no blood stains on clothes).

With regard to ¶ D.1.(1) (the prosecution's failure to produce the 1972 murder trial transcript), this Court evaluated the claim in its opinion, 999 F.Supp. at 1089-90, and concluded that the 1972 transcript "would not have affected the result" of the guilt stage, *Id.* at 1089, and was "not persuaded" that its absence "undermine[d] confidence in the outcome of the sentencing hearing,"*Id.* at 1090. The Court specifically noted that it reached this conclusion considering the effect of the absence of the 1972 transcript "standing alone," *Id.* Petitioner asks this Court to reconsider that conclusion for the reasons set out in this memorandum upon consideration of the cumulative effect of other identified errors, and not "standing alone."

With regard to ¶D.1.1(7) (the prosecution's failure to produce lab reports indicating no blood stains on clothes), this court concluded that it was not a proper *Brady* claim, because defense counsel could have had access to the information from sources other than the prosecutor. *Id.* at 1090. If it is not a proper *Brady* claim, by this Court's own conclusion it is necessarily an instance of ineffective assistance of counsel. It is one or the other, *See*, *Banks v Reynolds*, 54 F.3d 1508, 1515, n. 14 (10th Cir. 1995) (recognizing the propriety of considering claims, such as this, as alternatively either prosecutorial misconduct or ineffective assistance of counsel); and, Petitioner has, in fact, plead it in the alternative, *See,* Amended Petition, §§ D.(1)(7) (prosecutorial misconduct); and, A.(1) and (2); E.(2)(a) and (e) (ineffective assistance of counsel). This Memorandum, and attached appendices,

together with the reaction of jurors, as reflected by their Affidavits, filed separately, makes clear the prejudice suffered by Petitioner at guilt and at sentencing created by the absence of this evidence in the jury's deliberation.

C. Prosecutorial misconduct claims previously considered by the Tennessee Supreme Court.

In addition to the instances of prosecutorial misconduct identified, above, on the direct appeal of this case from trial, the Tennessee Supreme Court considered on the merits the fraction of prosecutorial misconduct claims that were revealed on the face of the trial court record. With regard to these relatively few instances of prosecutorial misconduct in the record at the time, the Tennessee Supreme Court found that the "conduct of the State's attorney [Zimmermann] bordered on deception" and "was improper," but, nevertheless concluded that these instances of prosecutorial misconduct did not require reversal. *State v Jones*, 789 S.W.2d 545, 552 (Tenn. 1990). The Tennessee Supreme Court did not consider these instances of prosecutorial misconduct cumulatively and collectively with other instances of prosecutorial misconduct, all instances of ineffective assistance of counsel, and the other errors committed in this case. This Court is in a position to consider these claims along with other errors reflected in the record that is now complete.

D. Instances of ineffective assistance of counsel.

At the trial of this case, Petitioner had viable defenses in the guilt stage that he was not the assailant and that, whether he was the assailant or not, he was insane at the time of the offense, both of which would have been consistent and complementary with the mitigation that he had to present at the sentencing stage of the trial. In spite of the availability of these defenses, defense counsel did not investigate potential defenses and did not present any defense, did not call any witnesses, and did not present any proof at all. At the

sentencing stage of the trial, Petitioner had an abundance of available mitigating evidence of which this Court is well familiar and which was addressed in this Court's opinion. *See* 999 F.Supp. at 1096-1102. Notwithstanding the availability of this abundance of mitigating evidence, defense counsel did not investigate it and was unaware of it. Consequently, he did not present it to the jury. *See*, Appendix A.

All of the state and federal courts sitting in collateral review of this conviction and sentence have agreed that the performance of counsel was constitutionally inadequate at both the guilt and sentencing stages. *See*, 999 F.Supp. at 1095. The only question among the courts was that of whether sufficient prejudice was created by the failures of counsel to warrant reversal. Since the only question was the sufficiency of the prejudice caused by counsel's recognized failures, then a review of claims becomes only a question of measuring the degree and impact of the prejudice. Whatever degree of prejudice exists at the guilt stage, as well as at the sentencing stage, whether or not it is sufficient standing alone to warrant reversal, must be considered collectively and cumulatively with other errors committed in the case in order to determine whether the cumulation of error warrants reversal.

From among the reviewing federal judges, including this Court and the Circuit panel, two of the four judges, who have reviewed the case, have found the prejudice sufficient to set side the sentence of death. Yet, none of the federal judges, including the two who decided to set the sentence of death aside, considered any issue other than the single question of whether the sentence of death should be set aside due to counsel's ineffectiveness at the sentencing stage. None of the judges considered any of the other claims properly raised by Petitioner, including the errors of counsel other than those committed in the sentencing stage of the trial, including the myriad instances of prosecutorial misconduct, and including any other errors committed in this case, cumulatively and

collectively with the claim of ineffective assistance of counsel at the sentencing stage of the trial.

Pursuant to T.C.A. § 39-2-203(h), a Tennessee capital defendant will avoid a sentence of death, if only a single juror holds out for a life sentence. Consequently, the prejudice determination involves only a determination of whether confidence in the outcome is sufficiently undermined so that "**one** juror **could** have found that he did not deserve the death penalty." (Emphasis added.) *Carter v Bell*, 218 F.3d 581, 592 (6th Cir. 2000) (single juror prejudice rule applied in Tennessee case); *see, also*, *Coleman v Mitchell*, 2001 WL 1194919, Sixth Circuit No. 98-3545, filed October 10, 2001 at 28 (single juror prejudice rule applied in a Ohio case). This standard has easily been met upon a collective evaluation of the universe of error that occurred in this trial. *See*, Jurors Affidavits, filed in separate pleading.

Tennessee law specifically recognizes lingering or residual doubt about guilt as proper mitigating evidence. *See*, *State v Teague*, 897 S.W.2d 248 (Tenn. 1995). In fact, Tennessee law requires the jury to consider the proof presented in the guilt stage during its deliberation in the sentencing stage. *See* T. C. A. § 39-2-203(e) (jury is directed by the instructing court to consider "any mitigating circumstances raised by the evidence at either the guilt or sentencing hearing or both"). If no defenses are presented during the guilt stage of the trial, as occurred in this case, nothing is presented in that stage for the jurors to consider in the sentencing stage, though viable defenses may have existed, as they did in this case.

The available and viable guilt stage defenses that trial counsel failed to present would have been persuasive mitigating evidence. Indeed, the available but unpresented guilt-stage defenses (*i.e.* that Petitioner was not the assailant, and that Petitioner did not have sufficient *mens rea*) may have been the strongest available mitigating evidence that Petitioner could have presented in this case. Assistant District

Attorney John Zimmermann testified that he anticipated it would be difficult to persuade the jurors to impose a sentence of death in this case. He stated that, in order to obtain a death verdict, it would be necessary to convince the jurors that Petitioner was the assailant "not beyond a reasonable doubt, but beyond a shadow of a doubt," FT 905. *See*, generally, FT 905-908. His opinion in that regard is reflected to be true in other cases, as well. In a study entitled *Why Jurors Vote Life or Death: Operative Facts in Ten Florida Death Penalty Cases*, Geimer and Amsterdam, 15 *Am. J. Crim. Law* 1 (1988), the authors concluded that the existence of some degree of doubt about the guilt of the accused was overwhelmingly the most often recurring factor in the juror's vote for a life sentence. *See*, particularly, 15 Am. J. Crim. Law at 28-34. In that study, 69% of the jurors interviewed identified "lingering" doubt about guilt as the "operative factor" in the vote for life. *See*, Table 2, 15 *Am. J. Crim. Law* at 27. Though guilt stage defenses may be considered to be the strongest mitigating evidence, in the determination of whether counsel was ineffective in this case, his failure to present guilt stage defenses has never been considered collectively with other errors in the determination of whether Petitioner's sentence of death should be set aside.

In order to properly evaluate the fairness and the reliability of this trial, it is incumbent on this Court to consider the total failures of defense counsel, both his failure to affirmatively present any of Petitioner's available defenses at both stages of the trial as well as his failure to rebut the fraudulent case presented by the prosecution, collectively and cumulatively with the instances of prosecutorial withholding of exculpatory evidence and the prosecutor's intentional deceit of Petitioner's evaluators, his defense counsel, the court, and the jury. Upon that evaluation, it is obvious that it would be a travesty of justice to allow this conviction and sentence to stand.

VI. Conclusion

For the foregoing reasons, this Court should grant Petitioner's Rule 60 motion and reverse its earlier dismissal of the substantial body of Petitioner's prosecutorial misconduct claims.

This Court should consider the merits of Petitioner's prosecutorial misconduct claims based upon the evidentiary record already created in this case.

In addressing Petitioner's prosecutorial misconduct claims, this Court should consider the claims both individually and cumulatively with all of Petitioner's other claims, including the claims of ineffective assistance of counsel at both the guilt and sentencing stages of Petitioner's case. The proof in this habeas case establishes prosecutorial fraud and deceit which constitute *per se* violations of Petitioner's constitutional rights requiring reversal of Petitioner's convictions and his death sentence. Viewed cumulatively with the other errors in Petitioner's case, including but not limited to the errors arising from the ineffectiveness of Petitioner's trial counsel, the proof in this habeas case establishes that Petitioner was grossly prejudiced at both the guilt and sentencing stages of his case.

Accordingly, this Court, upon considering all of Petitioner's claims, must grant Petitioner a writ of habeas corpus setting aside Petitioner's convictions and death sentence.

Respectfully submitted,

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OTHER COURT REPRIMANDS OF ZIMMERMANN, Appendix D To *Petitioner's Memorandum In Support Of Motion For Relief From Judgment Pursuant To Fed. R. Civ. P. 60(B).*

In a string of court opinions over the course of Zimmermann's career as a prosecutor (including opinions in Abu-Ali's case), the courts have repeatedly reprimanded Zimmermann for various legal and disciplinary violations. These reprimands demonstrate certain persistent patterns:

(i) Zimmermann's pattern of withholding exculpatory evidence;

(ii) Zimmermann's pattern of "misleading" defense counsel and the court; and

(iii) Zimmermann's pattern of knowingly violating court rulings relating to inadmissibility of evidence and improper jury argument.

Some of these court opinions are listed below:

1. In the direct appeal of Abu-Ali's case from the trial court to the Tennessee Supreme Court, Zimmermann was reprimanded by the Tennessee Supreme Court for handing inadmissible material to the jury during Abu-Ali's sentencing hearing. The Tennessee Supreme Court said:

> Defendant made a motion in limine prior to the sentencing hearing to prohibit any mention at the hearing that defendant was on parole at the time of the offense. In the course of arguing the motion the State's attorney stated he would not pass the records of defendant's prior murder conviction to the jury since they showed that defendant had received a life sentence and described the circumstances of the crime. .... The State's attorney then passed to the jury the record of defendant's conviction for assault with a deadly weapon which included a two-count indictment charging him with robbery in addition to the assault. Defense counsel raised an objection on

> the basis that the information it contained was irrelevant and requested the court to instruct the jury that the only information contained in the record which was applicable was the fact of the conviction. The trial judge gave the instruction requested.
>
> The defense objection was appropriate. The conduct of the State's attorney **bordered on deception** by which he was able to get before the jury information which was not evidence in the case they had under consideration. **The action of the State was improper**.

State v. Jones, 789 S.W.2d 545, 551-2 (Tenn. 1990). The Tennessee Supreme Court held, however, that this prosecutorial misconduct was "harmless," and therefore denied this claim as a basis for reversing the death sentence.

2. In the federal district court habeas proceeding, Judge Campbell held that Zimmermann committed a *Brady* violation by failing to turn over to Abu-Ali's trial counsel the transcript of Abu-Ali's prior (1972) murder trial. This transcript contained testimony of two psychiatrists, one for the defense and the other for the prosecution, which described aspects of Abu-Ali's mental illnesses and would have supported an insanity defense under Tennessee's definition of insanity. Although Judge Campbell found that Zimmermann had violated his *Brady* obligation to turn over this exculpatory evidence, Judge Campbell also found that, "standing alone," this instance of prosecutorial misconduct did not "undermine[s] confidence in the outcome of the sentencing hearing," and therefore he rejected this claim as a basis for awarding Abu-Ali relief. *Abu-Ali Abdur'Rahman v. Bell*, 999 F.Supp. 1073, 1089-90 (M.D.Tenn. 1998). Judge Campbell, however, did grant relief on grounds of ineffective assistance of counsel.

4. In *In re Zimmerman*, 1986 WL 8586 (Tenn.Crim.App. 1986), Zimmerman was held in contempt of court for violating Rule 16, Tenn.R.Crim.P., which is the rule

requiring the prosecution to disclose certain types of evidence to the defense prior to trial. Zimmermann argued that his noncompliance with Rule 16 "was clearly made through oversight" (his words) and was not "willful." The Court of Criminal Appeals said that this was not an excuse and characterized Zimmermann's actions as an **"abuse of, or unlawful interference with, the process or proceedings of the court."**

5. In *Zimmermann v. Board of Professional Responsibility*, 764 S.W.2d 757 (1989), Zimmermann was sanctioned for making inappropriate comments to the press in violation of the disciplinary rules. The court rejected his argument that his comments were protected by the First Amendment.

6. According to a Tennessean article published May 30, 1998, in the case of *State v. Vukelich* Zimmermann was chastised by Davidson County Circuit Court Judge Gayden for "misleading" the court into improperly issuing a seizure order for the seizure of a $102,000 investment account owned by the defendant and his wife which allegedly contained the proceeds of drug sales. According to the article:

> Circuit Judge Hamilton Gayden testified that he should not have signed the original seizure order March 13. Gayden said that, "upon reflection," he believes Zimmermann and Metro Drug investigator Ed Rigsby did not present enough evidence about the source of the funds to justify seizing them as the fruits of illegal drug dealing...The judge testified that **Zimmermann and Rigsby misled him into believing** that the money in the mutual fund account came from illegal activity."

Judge Gayden set aside the seizure order and directed that the investment account be returned to the Vukelichs.

7. In *State v. Middlebrooks*, 995 S.W.2d 550 (1999), a death penalty case, Zimmermann was reprimanded

for making two kinds of improper closing arguments to the jury at the conclusion of capital sentencing hearing. First, the court found that Zimmermann's "victim impact" argument was improper:

> [T]he prosecutor's statement, "his family asks you to impose the death penalty," was improper. Although evidence to this effect was not introduced during the sentencing hearing, and would have been inadmissible, the prosecutor's statement clearly is an improper characterization of the family's view as to the appropriate sentence.

Id. at 558. Secondly, the court found that Zimmermann's biblical references during closing argument (which were extensive) were also improper:

> We have condemned Biblical and scriptural references in a prosecutor's closing argument so frequently that it is difficult not to conclude that the remarks in this case were made **either with blatant disregard for our decisions or a level of astonishing ignorance of the state of the law** in this regard.... As we said in Cribbs, "in the face of this clear and longstanding precedent, **the repeated introduction by prosecutors of such references into trials of serious criminal offenses is inexplicable**."

Id. at 559. Although the court found these arguments to be improper, it also determined that these errors were harmless and therefore the court did not reverse the judgment below.

8. The more recent case of *Garrett v. State*, 2001 Tenn.Crim.App. LEXIS 206 (2001), presents a particularly egregious example of prosecutorial misconduct. The defendant was convicted of first degree murder and sentenced to life. The prosecution's theory at trial was that the defendant locked the victim in the room of a house and then burned the house down, killing the victim. A key factual issue at trial was whether the room where the victim was

found had been locked from the outside, which is what the prosecution alleged. Zimmermann had in his files an eleven-page report by an investigator which described a conversation with the Fire Detective who told the author of the report that the door to the room was, in fact, unlocked. Zimmerman never turned his report over to the defense counsel. In the post-conviction hearing, Zimmermann explained that he did not turn over this report to the defense because , essentially, he felt this information was unreliable. The Tennessee Court of Appeals rejected Zimmermann's explanation and found that he committed a *Brady* violation. Consequently, the court set aside the conviction and granted the defendant a new trial. The Court said:

> We are most troubled with the eleven-page Miller Report, which was not disclosed to the defendant.... The State contends that this report was neither withheld, exculpatory, nor material. We disagree in all respects. The evidence in the post-conviction hearing showed that **the prosecutor led defense counsel to believe** that the State had no information about the locked or unlocked status of the utility room door. However, at trial the State's witnesses testified that the utility room door was locked and the prosecutor submitted to the jury as the theory of the State's case that the defendant locked the victim in the utility room and set the house on fire. Therefore, the State did have, prior to trial, information that the door was locked. In fact, not only did the State have information that the door to the utility room was locked, but they also possessed the eleven-page Miller Report, which indicated otherwise: that Fire Captain Jenkins, who was the firs to enter the utility room and find the victim's body, found the door unlocked.
>
> This eleven-page report was clearly withheld from the defendant. However, the State, in its brief, claims that because Officer Miller informed defense

counsel that the door was unlocked then this information was not withheld. The State's assertion that the defendant was aware that the State had no information that the door was locked is undermined by the State relying so heavily at trial on testimony that the door was locked. Assistant District Attorney General Zimmerman, when questioned at the post conviction hearing as to why he did not include the eleven-page report in discover, stated, "I felt like Detective Miller's recollection was vague, he could not specifically remember the conversation he had with Captain Jenkins, and all he knew is what he had recorded in his report, which was equivocal, at best, and Jenkins was absolutely clear on it." **This Court is extremely troubled with General Zimmerman's decision** to himself determine the reliability of the evidence and to refuse to turn over evidence he believes is unreliable, especially when the evidence is requested and is exculpatory.

> Essentially, the State **intentionally withheld the information by leading the defendant to believe** they had no information about the status of the door and then pursuing the very opposite theory at trial: that the defendant had locked the victim in the utility room and set the house on fire. We agree with the defendant that the information was withheld.

9. *State v. Vukelich*, 2001 Tenn.Crim.App. LEXIS 734 (Sept. 11, 2001), was a drug trafficking and money laundering case that went to trial two times. In the first trial, Zimmermann asked a witness whether he had smoked marijuana with the defendant on two prior occasions. The trial judge ruled those questions to be irrelevant and inadmissible. In the second trial, despite the trial judge's ruling in the first trial, Zimmermann asked the same witness the very same questions. As described by the appellate court:

> The [trial] court immediately asked for a bench conference and excused the jury. The prosecutor apologized and claimed to have forgotten the trial court's earlier ruling, and **the trial court strongly admonished the prosecutor**.

Later in the opinion, the appellate court said that "the testimony solicited was **patently improper** given the trial court's previous ruling." The appellate court went on to say, however, that this error was harmless because the other evidence of the defendant's guilt was substantial.

EVIDENCE THAT PETITIONER WAS NOT THE ASSAILANT, *Appendix E To Petitioner's Memorandum In Support Of Motion For Relief From Judgment Pursuant To Fed. R. Civ. P. 60(B).*

The evidence in this case demonstrates that Petitioner was not the assailant who killed the murder victim, Patrick Daniels. At the very least, the evidence raises reasonable doubt about whether Petitioner was the assailant. Accordingly, the evidence fails to establish that Petitioner is guilty of premeditated murder. For this reason alone, Petitioner should be entitled tc a new trial regarding guilt. Moreover, the blood evidence clearly creates residual doubt about whether Petitioner was the assailant, which is an additional mitigating factor that must considered in this case. *State v. Teague*, 897 S.W.2d 248, 256 (Tenn. 1995); *State v. Hartman*, 42 S.W.3d 44 (Tenn. 2001). The effect of the unpresented blood evidence must be cumulated with the prejudicial effects of the other errors in this case.

A. According to the blood evidence, the assailant would have had blood stains on his clothes.

In the face of the crime scene photos and the police reports describing the extensive blood splattering, even Zimmermann testified before this Court that the assailant almost certainly would have had blood on his clothes. (FEx. 2-3; FT. 917). Dr. Kris Sperry gave his unrebutted expert testimony that, given the nature of the victim's wounds and the amount of blood splattering, the assailant certainly would have had blood on his clothes. (FT. 37-8, 77).

B. Petitioner's clothes tested negative for blood stains.

Petitioner's clothes tested negative for blood stains. These clothes included Petitioner's long dark wool coat that he was wearing on the night of the offense. (FEx. 115, 117). According to Dr. Sperry, the tests performed by the T.B.I. crime lab would have detected the blood stains. (FT. 38, 61). He also testified that the blood stains could not have been cleansed from the wool fabric of the coat without

permanently damaging the fabric. (FT. 59-61).

C. <u>Therefore, because Petitioner was wearing his long black wool coat at the time, he could not have been the assailant</u>.

The prosecution recognized that the absence of blood on Petitioner's clothes was a weakness in their case. See Zimmermann's internal memo (FEx. 42, at Bates stamp p. 000678). As acknowledged by this Court, the only way to reconcile the blood evidence with the charge that Petitioner was the assailant would be to assume that Petitioner somehow was not wearing the coat at the time of the assault. (See this Court's opinion, 999 F.Supp. 1085). There are at least two problems with this assumption:

First, all of the evidence in the case tends to show that Petitioner wore his long dark wool coat at the time of the offense. Norma Norman testified that Petitioner was wearing the coat from the time he entered the apartment on the night of the offense to the time she was tied up and blindfolded. (T. 1332, 1334, 1343, 1364, 1366-7). Devalle Miller, the co-defendant, also testified that Petitioner was wearing the long wool coat at the time of the offense. (T. 1451, 1454, 1462, 1465). The prosecution introduced this same wool coat into evidence (as Trial Exhibit 12), identified the coat as the one that Petitioner was wearing at the time, and showed the coat to the jury during the guilt stage closing argument in support of their argument that Petitioner was the assailant. (T. 1333, 1672-3).

Second, as described in Petitioner's briefing to this Court, the evidence in this habeas proceeding establishes that the prosecution spent literally hours preparing Miller, the only eyewitness to the assault, to testify at Petitioner's trial. At no time has Miller ever said that Petitioner took off his coat during the assault. Given the prosecution's acknowledgement of the weakness in their case raised by the blood evidence, if Petitioner did take his coat off for the assault, then certainly the prosecution would have elicited that information from

Miller. Because Miller never said that Petitioner was without his coat, and because there is absolutely no other evidence that even hints that Petitioner took off his coat at the time of the assault, the inescapable conclusion is that Petitioner wore the coat throughout the offense including the precise time when the assault occurred.

D. <u>The evidence supports the proposition that Miller was the assailant</u>.

By contrast, there are a number of reasons to suspect that Miller in fact was the assailant. These reasons include the following:

1. According to Norman's testimony, while Petitioner and Miller were in the apartment, Miller was standing in the kitchen area. Accordingly, he would have had easy access to the knife that was used in the assault. (T. 1344).

2. Also according to Norman's testimony, before she was tied up, Miller was in a panic and threatened to kill the dogs. (T. 1371). He therefore was obviously fearful of how the dogs might draw attention to what they were doing, and it can be assumed that he would have been fearful of leaving either Daniels or Norman as witnesses. If in his panic he threatened to kill the dogs, it is reasonable to imagine that he would have been willing to kill Daniels and Norman.

3. On the day of Petitioner's arrest, two days after the offense, when Petitioner's wife was driving Miller to his apartment, Miller acted strangely by taking off his field jacket and work shirt and throwing them in the back of the car. His trial testimony on this went as follows:

> Q. Did you leave anything in the car that day?
>
> A. Yes, I did. I was pretty scared and pretty uptight. I took off my - I had a field jacket on and a work shirt, and I left them in the car.
>
> Q. Where did you place that field jacket and work shirt?
>
> A. I just threw them in the back.

> Q. Mr. Miller, can you explain what you did that for?
>
> A. I was just panicking and scared.
>
> Q. Panicking and scared about what?
>
> A. I feared - I thought that, you know, somebody might recognize me walking back to my apartment, and, you know, I just thought I might get picked up, so I took - threw the jacket and the shirt off.

(T. 1481). Miller's explanation for this unusual behavior was not satisfactory. This behavior reveals a fearful response to the situation, which would be consistent with the idea that he was the assailant. The most logical explanation of this behavior is that Miller did not want to be caught wearing clothes that might contain signs of the assault, i.e. blood stains. It is significant that Miller's clothes never were tested for blood stains.

4. Most significantly, in his original statement to the prosecution and at Petitioner's trial, Miller gave clearly fabricated descriptions of the assault. In his original statement to the prosecution, Miller said Petitioner "proceeded to stab [Daniels] numerous times uh both in the back and in the chest." (FEx. 51, at Bates stamp p. 000166). At Petitioner's trial, Miller testified that immediately after the assault, Daniels "was laying on the floor. And he was - he was face down, I believe - he was face down. And he was just going into convulsions, ..." (T. 1472; See, also, FEx. 119). Dr. Sperry testified, however, that Miller's testimony contradicted the physical evidence. (FT. 47-50). Dr. Sperry pointed out that the medical examiner's autopsy report indicated that Daniels suffered stab wounds only in the front chest area, and not in his back as Miller had testified. (See, also, the autopsy report and Dr. Harlan's trial testimony: FEx. 14, 113 and 114; T. 1658). Dr. Sperry further testified that, based on the blood patterns revealed by the crime scene photos, Daniels could not have been lying face down, again contrary to Miller's

testimony. (See, also, FEx. 3, the police report describing Daniels as "laying face up on the floor.") Again, Dr. Sperry's testimony on these points was unrebutted, and the state has offered no explanation to reconcile Miller's testimony with the physical evidence.

The fact that Miller gave fabricated descriptions of what actually happened with Daniels demonstrates that he was making things up. Given that he confessed to participating in the events leading up to the assault and was prepared to plead guilty to second degree murder in exchange for his testimony, there is only one plausible reason for Miller's fabricated account of the assault: there was something important about the assault that he wanted to hide. The best explanation is that Miller, in fact, was the assailant.

Other than Miller's own testimony, which is inherently unreliable, all of the evidence in the case is consistent with the theory that Miller was the assailant.

D. <u>Petitioner's sentencing hearing "confession" does not rebut these conclusions</u>.

In light of the foregoing evidence, the state has offered only one rebuttal to the theory that Petitioner was not the assailant. The state relies on Petitioner's sentencing hearing testimony where the state alleges that he confessed to the killing. This rebuttal, however, is flawed for the following reasons:

1. Every witness who has spent time with Petitioner during the period after the offense has testified that Petitioner has consistently reported that he does not remember what happened when Daniels was killed. <u>See</u> testimony of Susie Bynum (FT. 1245), Neal McAlpin (FT. 212), Sumter Camp (FT. 732-3), Richard Dinkins (FT. 888), and Dr. Sadoff (FT. 471-2, 485). The MTMHI records also reflect that during their evaluation of him, he lacked any recollection of what happened at the time of the assault. In the Interdisciplinary Notes dated 2/11/87 from the MTMHI file, Dr. Marshall reported, "When asked about killing the allegedly [sic]

victims he said I don't know if I killed him or not." (FEx. 125).

2. Contrary to the state's assertions, Petitioner's sentencing hearing "confession" did not reflect a recollection of what actually happened. Nowhere in his sentencing hearing testimony did Petitioner ever say that he recalled stabbing either of the victims; and in fact he tried to say that he did not have any such recollection. (*See, e.g.*, T. 1865, where Petitioner said, "I don't remember," and T. 1996, where Petitioner said that he was admitting to the killings because of "information you [the prosecutor] have given," and not because of his own recollection of what happened). The exact nature of Petitioner's testimony, and the fact that he never admitted to having a specific recollection of the assault, was discussed in some detail during Dr. Sadoff's testimony before this Court. (FT. 486-497).

3. The fact that Petitioner has no recollection of what happened is consistent with his documented history and his mental illness. As Dr. Sadoff testified, and as reflected in Petitioner's social history, Petitioner has a history of "hysterical blindness" or blackouts. Also as Dr. Sadoff explained, this kind of history is characteristic of someone like Petitioner who suffers from Post-Traumatic Stress Disorder and Borderline Personality Disorder. (FT. 463, 472-3).

4. To the extent Petitioner may have made a confession during his sentencing hearing testimony, that confession was not reliable. Due to his mental illnesses, Petitioner is emotionally unstable. (FT. 467, 483). Petitioner received ineffective representation at trial and he therefore presumably felt unprotected when he was called to the witness stand. He was never prepared for his testimony, and in fact did not know he was about to testify until moments before he was called to the stand. (FT. 731-2, 765). His "confession" occurred under relentless cross examination, and he basically broke down on the stand such that the trial court found it

necessary to call a recess so that he could compose himself. (T. 1871, FT. 731). Sumter Camp testified before this Court that because of Petitioner's emotional instability and lack of preparation, Petitioner was not in a condition to testify, and his testimony was "one of the saddest things I have seen in my legal career." (FT. 1731). Moreover, Petitioner had just been found guilty of first degree murder by the same jury that was then considering whether to impose the death penalty, and his only option was to plead for mercy. (*See* Lionel Barrett's testimony on this point where he said that his only strategy at sentencing was based on a "hope" for "mercy." FT.378-9). Petitioner had heard Miller testify that Petitioner was the assailant. Also, Petitioner had every reason to believe that, contrary to the truth, blood was found on his clothes. We know, for example, that when Petitioner was at MTMHI, at least, he was incorrectly told that blood was found on his pants. (FEx. 151, pp. 2-3). Petitioner's trial counsel failed to learn of the blood evidence, and so Petitioner's mistaken impression was never corrected. Petitioner, therefore, had no means of disputing the prosecution's charge that he was the assailant, either to the court or in his own mind. Consequently, the most logical thing for him to do under all of these circumstances would be to admit to the killing in an effort to persuade the jury to spare his life. Under these circumstances, any "confession" that Petitioner may have given cannot be regarded as any kind of reliable account of what actually happened. *Cf. Herman v. Claudy*, 350 U.S. 116, 76 S.Ct. 223, 100 L.Ed. 126 (1956) (courtroom confession by defendant while pleading for mercy is not reliable and therefore not dispositive of defendant's habeas claim).

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION
No. 3: 96-0380

ABU-ALI ABDUR' RAHMAN,
Petitioner,
vs.
RICKY BELL, Warden,
Respondent

RESPONSE IN OPPOSITION TO MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FED. R. CIV. P. 60(B)

Petitioner has moved, pursuant to Fed. R. Civ. P. 60(b), for relief from this Court's judgment, as set forth in its 8 April 1998 Memorandum and Order, *Abdur'Rahman v. Bell*, 999 F.Supp. 1073 (M.D.Tenn. 1998), *rev'd on other grounds, aff'd in part and rev'd in part*, 226 F.3d 696 (6th Cir. 2000), *reh'g and suggestion for reh'g en banc denied, cert. denied*, 122 S. Ct. 386 (2001), *pet. for reh'g pending*.[1] He predicates his request upon Tenn. S. Ct. R. 39, issued 28 June 2001. Respondent submits that Tenn. S. Ct. R. 39 does not provide proper justification for relief under Fed. R. Civ. P. 60(b), and that it is improper for petitioner to use Fed. R. Civ. P. 60(b) as a vehicle to disturb the finality of this Court's judgment, as modified.[2] Accordingly, his motion for relief from judgment

[1] On 10 October 2001, petitioner filed a Motion to Withhold Mandate and Grant Rehearing En Banc or Remand for Further Proceedings, in the Sixth Circuit, to which respondent has responded in opposition and to which petitioner subsequently replied. In Part V. of this motion, petitioner advances the argument that rehearing en banc is appropriate because of the intervening promulgation of Tenn. S. Ct. R. 39.

[2] Petitioner has also included in his motion substantive arguments regarding additional habeas claims he alleges should now be considered

should be denied for the reasons set forth herein.[3]

I.

JURISDICTION

Although Fed. R. Civ. P. 60(a) specifically addresses the issue of a district court's jurisdiction over an action while on appeal, Rule 60 (b) is silent in this regard. *Lewis v. Alexander*, 987 F.2d 392, 394 (6th Cir. 1993). As a general rule, filing a notice of appeal divests the district court of jurisdiction and transfers jurisdiction to the appellate court. The district court retains jurisdiction only over matters that are in aid of appeal.[4] *Id.* (*citing Cochran v. Birkel*, 651 F.2d 1219, 1221 (6th Cir. 1981)). If the district court is disposed to grant a Rule 60 (b) motion filed there, the court may enter an order so certifying, and the moving party may then file a motion in the appellate court to remand the case. *First Nat'l Bank Salem, Ohio v. Hirsch*, 535 F.2d 343, 345-46 (6th Cir. 1976) (per curiam).

II.

PROPRIETY OF A RULE 60(b) MOTION IN A 28 U.S.C. § 2254 PROCEEDING

Petitioner cites to *Rodriguez v. Mitchell*, 252 F.3d 191, 199 (2d Cir. 2001), as authority for this Court to

by this Court as no longer procedurally defaulted in reconsidering its judgment. Respondent submits that such argument is appropriate only when and if this Court agrees that it may, and is so disposed, to entertain the Rule 60(b) motion. Therefore, respondent requests that he be afforded an appropriate period of time to respond to these procedurally defaulted claims if the Court should decide to entertain petitioner's Rule 60(b) motion.

[3] Respondent notes at the outset that the Sixth Circuit has granted a Certificate of Appealability in another case on the following issue: "[W]hether, in light of Tennessee Supreme Court Rule 39, as amended June 28, 2001, Adams procedurally defaulted claim (7) . . .," *Adams v. Holland*, No. 00-6575 (6th Cir. Aug. 16, 2001) Certificate of Appealability granted (copy attached).

[4] Because the mandate has not issued from the Sixth Circuit, it is respondent's position that this case is still on appeal.

entertain a Rule 60(b) motion in a federal habeas proceeding brought by a state prisoner. However, the Sixth Circuit has stated that "[w]e agree with those Circuits that have held that a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition. . . ." *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996), *reh'g and suggestion for reh'g en banc denied, cert. denied sub. nom., McQueen v. Parker*, 520 U.S. 1257, 117 S. Ct. 2422, 138 L.Ed.2d 185 (1997); *accord United States v. Rich*, 141 F.3d 550, 551 (5th Cir. 1998), *cert. denied*, 526 U.S. 1011, 119 S. Ct. 1156, 143 L.Ed.2d 221 (1999); *Thompson v. Calderon*, 151 F.3d 918, 921 (9th Cir. 1998) (*en banc*); *Felker v. Turpin*, 101 F.3d 657, 660-61 (11th Cir. 1996) (*per curiam*); *United States v. Hernandez*, 158 F.Supp.2d 388, 391 (D.Del. 2001).[5]

Even if this Court were to find that the terms of the AEDPA's limitations on second or successive applications, 28 U.S.C. § 2244(b), do not govern this case, it "must be guided by the general principles underlying [the Supreme Court's] habeas corpus jurisprudence." *Calderon v. Thompson*, 523 U.S. 538, 554, 118 S. Ct. 1489, 1500, 140 L.Ed.2d 728 (1998). Because of "'the profound societal costs'" attendant with the exercise of habeas jurisdiction, the Court has imposed significant limitations on the federal courts' ability to grant habeas relief. *Id.* at 555. Those limitations are based on the Court's "enduring respect for 'the State's interest in the finality of convictions that have survived direct review within the state court system.'" *Id.* When lengthy federal proceedings have run their course and a mandate denying relief should have, by all rights, issued, *see* Fed. R. App. P. 41(d)(2)(D), finality acquires an added moral

[5] *McQueen* went on to state that such a motion would be subject to a cause and prejudice analysis, which was the old standard under the abuse of the writ doctrine. Second and successive habeas petitions must now meet the criteria of 28 U.S.C. § 2244 (b) and be decided upon by the Circuit Court of Appeals.

dimension, because "[o]nly with an assurance of real finality can the State execute its moral judgment," allowing victims to move forward with their lives. *Id.* at 556. "To unsettle these expectations is to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty.'" *Id.*

Therefore, the proper procedure would be to transfer the matter to the Sixth Circuit for their determination of whether petitioner's Rule 60(b) motion satisfies the gateway criteria of 2244 (b).

III.

TENN. S. CT. R. 39 DOES NOT HAVE RETROSPECTIVE APPLICATION

Tennessee Supreme Rule 39 reads as follows:

> In 1967, the General Assembly created the Tennessee Court of Criminal Appeals in order to reduce the appellate backlog in criminal cases. In most criminal and post-conviction cases, review of a final order of the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion. Permission to appeal will be granted by this Court only where special and important reasons justify the exercise of that discretionary review power. Tenn. R. App. Proc. 11. We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for permission to appeal upon the Court of Criminal Appeals' denial of relief in order to exhaust all available state remedies for purposes of federal habeas corpus litigation. In order to clarify that denial of relief by Court of Criminal Appeals shall constitute exhaustion of state remedies for federal habeas corpus purposes, we hereby adopt the following Rule 39, Rules of the Supreme Court, as stated below.
>
> In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to

petition for a rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tennessee Code Annotated, § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

"Statutes, regulations, and rules of court must be read in a "straightforward" and "commonsense" manner." *In re Laurain*, 113 F.3d 595, 597 (6th Cir. 1997); *cf. Duncan v. Walker*, 531 U.S. 991, ____, 121 S. Ct. 2120, 2124-25, 150 L.Ed.2d 251 (2001) (statutory construction begins with language of statute, with duty to give effect, if possible, to every clause and word); *Seals v. State*, 23 S.W.3d 272, 276 (Tenn. 2000) (basic principle of statutory construction is to ascertain and give effect to legislative intent, without unduly restricting or expanding intended scope).

Petitioner relies on Rule 39 for the proposition that it applies retrospectively to remove discretionary appeal to the Tennessee Supreme Court from the state review process. Respondent submits, however, that Rule 39 does not apply retrospectively.

First, if the Tennessee Supreme Court intended for Rule 39 to have retrospective application it could have clearly and

unambiguously said so. It did not.

Second, a careful reading of Rule 39 shows that the operative word is "shall," a word clearly and unambiguously signaling future conduct, *e.g.*, "a litigant shall not be required to petition for a rehearing or to file an application for permission to appeal. . .," and, "the litigant shall be deemed to have exhausted all available state remedies. . ." The only significance of the July 1, 1967 date mentioned is that this is the date that the Court of Criminal Appeals was created.

Third, it is helpful to look at the standards applied by the Tennessee courts in order to determine whether or not a new rule, statute or other rule of law will be given retrospective application.

With regard to statutes, they do not operate retrospectively unless it is so provided in the statute. "However, statutes dealing with matters of procedure or remedy are generally held to be applicable to proceedings after enactment even though the facts occurred prior to enactment. *Mangrum v. Wal-Mart Stores, Inc.*, 950 S.W.2d 33, 37 (Tenn. App. 1997). Where there is a new law changing a rule of practice, the new rule is applicable to all cases then pending in the state system. *Frame v. Marlin Firearms Company, Inc.*, 514 S.W.2d 728, 730 (Tenn. 1974).

Even when imprisonment or a death sentence are at issue, most changes in the law, including those of constitutional dimension, do not affect judgments that became final before the change occurred. *See, e.g., Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Petitioner's case has been final so far as the state system is concerned since 10 June 1991.

Furthermore, as discussed *infra*, the apparent benefits sought through enactment of Rule 39 cannot be achieved through retrospective application, rendering such application meaningless, because individuals such as petitioner cannot return to state court.

IV.

TENN. S. CT. R. 39 MAY NOT EXPRESSLY DIRECT FEDERAL COURTS TO DEEM CLAIMS EXHAUSTED

Even if this Court disagrees with respondent and finds that the Tennessee Supreme Court meant for Tenn. S. Ct. R. 39 to apply retrospectively, that intention is not binding on the federal courts. It is the federal courts, not the state courts, that must determine whether "available" remedies have been "exhausted" in the state courts before the federal courts can hear a claim. As such, the Supremacy Clause prevents Rule 39 from being so directive to the federal courts. *Mattis v. Vaughn*, 128 F.Supp.2d 249, 259 (E.D. Pa. 2001).[6]

To interpret Rule 39 as petitioner does would have the effect of saying that, even though Sixth Circuit and Supreme Court precedent make seeking discretionary review mandatory for exhaustion in the absence of such an order or rule, *see O'Sullivan v. Boerckel*, 526 U.S. 838, 842, 119 S.Ct. 1728, 1731, 144 L.Ed.2d 1 (1999); *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990), this Court is now required to treat such review as not having been available in the past. This too, would be a Supremacy Clause violation. *Mattis v. Vaughn*, 128 F.Supp.2d at 261. In other words, Rule 39 would be an attempt by the Tennessee Supreme Court to rewrite history by directing the federal courts to treat the Tennessee system as never having required Tenn. R. App. P. 11 applications to the Tennessee Supreme Court for discretionary review. *See Wenger v. Frank*, 266

[6] Furthermore, Tenn. S. Ct. R. 39 raises a serious separation of powers question under the Tennessee Constitution. All legislative authority is vested in the General Assembly. Tenn. Const. art. II, § 3. The courts are expressly forbidden by the constitution from exercising any of the powers belonging to the legislative department. Tenn. Const. art. II, § 2; *Ballentine v. Mayor of Pulaski*, 83 Tenn. 633 (1885).

F.3d 218, 226 (3rd Cir. 2001).[7]

Respondent submits that the only constitutional interpretation of Tenn. S. Ct. R. 39 is one reading the Rule as a statement that, effective immediately, the ordinary appeals process in Tennessee no longer necessarily includes Tenn. R. App. P. 11 applications.

V.

OTHER VALID, PRACTICAL CONSIDERATIONS

Even if the Supremacy Clause problem did not exist, there are other, valid reasons why Tenn. S. Ct. R. 39 should not be applied retrospectively.

First, the purpose of Rule 39 is to discourage petitions for discretionary review under Tenn. R. App. P. 11. "Permission to appeal will be granted. . . only where special and important reasons justify the exercise of that discretionary review power." Tenn. S. Ct. R. 39. As such, Rule 39 is not designed to benefit state prisoners seeking to litigate claims that were previously procedurally defaulted in federal court. Rather, the obvious purpose is an attempt by the Tennessee Supreme Court to control its docket. Such a purpose is not served by retrospective application of Rule 39. Any docket relief for the Tennessee Supreme Court could be prospective only. *See Wenger v. Frank*, 266 F.3d at 225.

Second, making Rule 39 retrospective would serve only to greatly increase the burden on federal courts without providing any additional relief to the Tennessee Supreme Court. It begs the obvious to note that, over the years, numerous habeas claims have been denied because they were procedurally defaulted due to a petitioner's failure to raise

[7] Indeed, the preamble to Tenn. S. Ct. 39 itself contains a tacit admission of the recognized state of the law on exhaustion of state remedies regarding the need to file a Tenn. R. App. P. 11 application wherein the court states that, "criminal and post conviction relief litigants routinely petitioned" for Rule 11 relief in order to exhaust all available state remedies for purposes of federal habeas corpus litigation."

them to the Tennessee Supreme Court. To accept petitioner's position, every habeas corpus decision since 1 July 1967, wherein procedural default was enforced because a petitioner failed to exhaust state remedies through Rule 11 application to the Tennessee Supreme Court, would be subject to reopening even where, as here, judgment is final.

Third, there can be no serious argument that petitioner has relied upon the newly-created provisions of Rule 39 to his detriment, although this would be a legitimate concern for the federal courts in regard to Rule 39's prospective application. *See O'Sullivan v. Boerckel*, 562 U.S. at 862 (Stevens, J., dissenting) (federal courts should not find procedural default where state prisoner has relied to his detriment on state supreme court's explicit statement that he need not present every claim to it in order to exhaust state remedies).

VI.

PETITIONER'S RELIANCE ON FED. R. CIV. P 60(b)(6) IS INAPPROPRIATE

Fed. R. Civ. P. 60(b) provides six grounds under which a party may seek relief from a judgment or order. It appears from a plain reading of the Rule and petitioner's motion that he seeks to travel under the sixth ground: "any other reason justifying relief from the operation of the judgment."

"Rule 60(b) should apply only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule.'" *Olle v. Henry & Wright Corporation*, 910 F.2d 357, 365 (6th Cir. 1990), *reh'g denied*. It is invoked only in those "unusual and extreme situations where principles of equity mandate relief." *Id.* (emphasis in original). Rule 60 (b) (6) exists to allow courts to vacate judgments whenever such action is appropriate to accomplish justice in extraordinary circumstances. *Klapprott v. United States*, 335 U.S. 601, 614-15, 69 S.Ct. 384, 390, 93 L.Ed. 266 (1949). Accordingly, respondent submits that even petitioner's proffered reason, the retrospective application of Rule 39, does not meet this criteria. Petitioner could not have

relied on the substance of this rule to his detriment because, at the time of petitioner's travel through the state court review process, the well-established law in this Circuit required exhaustion through the highest state court.

Furthermore, Rule 60(b) incorporates the concept of lack of fault on the part of a petitioner. Here, where petitioner, knowing what the law of this circuit was regarding exhaustion, purposely sought Rule 11 relief as to some claims, but not others, he should not now be heard to complain. *Burke v. United States*, 1999 WL 1065217 (E.D.Pa. 1999) (copy attached). Free, calculated, deliberate choices are not appropriate for Rule 60(b) (6) relief. *Norgaard v. DePuy Orthopaedics, Inc.*, 121 F.3d 1074, 1076 (7th 1997).

VII.

CONCLUSION

Based upon the foregoing, respondent respectfully requests that petitioner's motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b) be transferred to the Sixth Circuit Court of Appeals as a second or successive petition, or that it be denied outright.

Respectfully submitted,
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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: ORDER ESTABLISHING RULE 39, RULES OF THE SUPREME COURT OF TENNESSEE: EXHAUSTION OF REMEDIES [*APPENDIX B TO PETITIONER'S MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FED. R. CIV. P. 60(B)].*

In 1967, the General Assembly created the Tennessee Court of Criminal Appeals in order to reduce the appellate backlog in criminal cases. In most criminal and post-conviction cases, review of a final order of the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion. Permission to appeal will be granted by this Court only where special and important reasons justify the exercise of that discretionary review power, Tenn. R App. Proc. 11. We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for permission to appeal upon the Court of Criminal Appeals' denial of relief in order to exhaust all available state remedies for purposes of federal habeas corpus litigation. In order to clarify that denial of relief by the Court of Criminal Appeals shall constitute exhaustion of state remedies for federal habeas corpus purposes, we hereby adopt the following Rule 39, Rules of the Supreme Court, as stated. below.

> In all appeals from criminal convictions on post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a

> claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tennessee Code Annotated, § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

FOR THE COURT:
Riley Anderson, Chief Justice